In September 2016, RAKIA demanded $4,162,500 from Azima, claiming based on "recently obtained" information that it had accessed "via publically available internet sources." Id. ¶ 49, J.A. 425. RAKIA attached examples, which included proprietary and confidential information stolen from Azima. Id. ¶ 50. A computer expert retained by Azima could not download the vast majority of Azima's stolen data that RAKIA claims is publicly available. Id. ¶ 58, J.A. 427. RAKIA admits to possessing thirty gigabytes of Azima's data, claiming they have the right to use it as they "see fit." Id. ¶ 57. To date, no one besides RAKIA and RAKIA's counsel is known to have accessed the files RAKIA claims are publicly available. Id.

Because of RAKIA's hack, Azima has incurred substantial expenses, as he was forced to hire computer experts to take responsive measures, including replacing the infected computers. Id. ¶¶ 31–33, 82, J.A. 420–21, 433. RAKIA's attack has disrupted Azima's businesses, and Azima has not been able to restore all of his data. Id. ¶¶ 82–83, J.A. 433–34. […]

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT IT HAD JURISDICTION TO HEAR THIS DISPUTE UNDER THE THIRD CLAUSE OF THE COMMERCIAL ACTIVITIES EXCEPTION TO FOREIGN SOVEREIGN IMMUNITY.

The Foreign Sovereign Immunities Act ("FSIA") allows courts to exercise jurisdiction over foreign sovereigns in cases where "the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). RAKIA, an "investment organ" of RAK which exists only to facilitate commercial activity, engaged Azima's services as a mediator in a commercial dispute, a squarely "commercial activity." Memorandum Op. 17, J.A. 1240. Later, when the mediation stalled, RAKIA hacked into and damaged Azima's U.S.-based computers to gain leverage in their commercial relationship, subjecting it to jurisdiction. Because

the District Court did not commit clear error as a matter of fact and its subsequent findings are correct as a matter of law, its order denying the motion to dismiss should be left undisturbed.

A. Azima's Mediation of the Dispute Between RAKIA and Massaad is Commercial Activity Under the FSIA.

For purposes of the FSIA, commercial activity is defined in reference to the "character of an activity . . . by reference to the nature of the . . . particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). In Republic of Argentina v. Weltover, 504 U.S. 607 (1992), the lead case interpreting the clause of the commercial activities exception at issue, the Court held Argentina was subject to jurisdiction for claims arising out of its unilateral rescheduling of bond payments. There, the underlying commercial activity was the issuance of the bonds, and Argentina's purpose of addressing a domestic credit crisis did not make this activity less commercial: "[I]t is irrelevant why Argentina participated in the bond market in the manner of a private actor; it matters only that it did so." Id. at 617. The Court held "commercial" is a term of art within the statute, referring to "the meaning generally attached to that term under the restrictive theory" of sovereign immunity. Id. at 612–13. According to the restrictive theory, a foreign government is immune when it "exercise[s] powers peculiar to sovereigns," but subject to suit when it acts with "those powers that can also be exercised by private citizens." Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 704 (1976). Because engaging the services of a mediator is a power that can be exercised by private citizens—not one peculiar to sovereigns—RAKIA engaged in "commercial activity" for purposes of the FSIA.

Although RAKIA now contests Azima's role in RAKIA's dispute with Massaad, RAKIA's former CEO accused of embezzlement, the District Court's factual finding that Azima served as a mediator is not clearly erroneous and should not be disturbed. Azima has a long commercial history with RAK and its affiliates, including entering into a joint venture for a pilot academy for which

RAKIA acted as guarantor, introducing the ruler of RAK to political and business leaders, and mediating other disputes. Am. Compl. ¶¶ 18–22, J.A. 416–18. Because of this relationship, particularly Azima's repeated service as a mediator, RAKIA logically turned to Azima for assistance in its dispute with Massaad. Id. ¶ 23, J.A. 418–19. Using his connections to both parties, Azima coordinated multiple meetings between RAKIA and Massaad and met with RAKIA to discuss the issue. Email Exchange from 1/28/2016 – 1/31/2016, J.A. 1004–05; Buchanan Decl. ¶ 11, J.A. 907.

RAKIA contends that rather than acting as a mediator, Azima worked on behalf of Massaad. See Appellant's Br. at 15–16. However, RAKIA noted in the March 2016 settlement agreement relating to the HeavyLift joint venture that "Azima has recently provided negotiation assistance to RAKIA on an informal basis which RAKIA recognises and appreciates." Settlement Agreement 2, J.A. 603. If RAKIA believed Azima was acting on behalf of Massaad, it would not describe that as "provid[ing] negotiation assistance *to RAKIA*." Id. (emphasis added). Further, James Buchanan, RAKIA's representative, called Azima one of "the middle men, the messengers" and thanked him for his "ongoing Henry Kissinger role." Email Exchange from 7/23/2016 – 7/25/2016, J.A. 992; Email Exchange from 11/28/2015 – 11/30/2015, J.A. 1002. RAKIA's contemporaneous descriptions of Azima's work shed more light than RAKIA's present arguments, indicating Azima acted as a mediator. Nor does the lack of payment tendered from RAKIA at the outset make Azima's mediation services non-commercial. Weltover, 504 U.S. at 616 ("Engaging in a commercial act does not require the receipt of fair value, or even compliance with the common-law requirements of consideration."). While providing mediation services, Azima also proposed a variety of new business ventures to RAKIA. See Buchanan Decl. ¶14, J.A. 907–08. As the District Court noted, that Azima could propose new business ventures to RAKIA contradicts the argument

that he "was merely a biased, uncompensated interloper . . . ." Memorandum Op. 20, J.A. 1243. In sum, there exists a substantial factual basis to conclude Azima acted as a mediator, and there is no clear error in doing so.

Furthermore, the mediation was commercial, rather than sovereign, activity. There is nothing essentially sovereign about disputes between companies and their former employees over allegations of embezzlement, and mediation is a common way to resolve such disputes. See, e.g., Scipar Inc. v. Simses, No. 07CV63A, 2009 WL 1748703 (W.D.N.Y. June 19, 2009) (embezzlement dispute between company and former employee referred to mediation while parallel criminal investigation is ongoing); Champion Laboratories, Inc. v. Burch, No. 06-cv-4031-JPG, 2008 WL 1701896 (S.D. Ill. April 9, 2008) (mediation ordered in dispute between company and former employee accused of embezzlement). Neither of the employers in Scipar Inc. or Champion Laboratories, Inc. were governmental, yet RAKIA's logic suggests the companies' attempts to claw back assets would be "sovereign acts." See Appellant's Br. at 16.

RAKIA argues that because its engagement with Azima was "part of a criminal investigation directed toward the recovery of state assets and the prosecution of Dr. Massaad," it is a sovereign activity. Id. However, this speaks to the purpose of the mediation, rather than its nature. As the legislative history of FSIA indicates, "the fact that goods or services . . . are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical." H.R. Rep. No. 94-1487, at 16 (1976). RAKIA contacted Azima to provide mediation services, just as companies seek out dispute resolution services every day.

RAKIA relies on two cases, Nelson and Chettri, to argue otherwise. In Nelson, a foreign sovereign was held immune from jurisdiction for claims arising out of the imprisonment and torture of a U.S. citizen abroad. Nelson v. Saudi Arabia, 507 U.S. 349 (1993). RAKIA argues

under Nelson, when the government acts "in connection with its police power," it acts as a sovereign. Appellant's Br. at 9. However, Nelson turned on an entirely different clause of the commercial activities exception, making it inapposite. That clause gives jurisdiction over actions "based upon a commercial activity carried on in the United States." 28 U.S.C. § 1605(a)(2). In contrast, under the exception at issue here, the suit must be "[based] upon an act . . . in connection with a commercial activity," a key difference in phrasing, suggesting a looser nexus is required. 28 U.S.C. § 1605(a)(2). The commercial activity was Nelson's recruitment and hiring in the United States, while his suit was "based upon" the tortious acts of Saudi Arabia in Saudi Arabia. Nelson, 507 U.S. at 358. In other words, Nelson's case failed not because recruiting someone to provide services is not commercial activity, but because his suit was not "based upon" that activity. Id.

Chettri, a Second Circuit case, used a similar analysis and thus is similarly inapposite. There, the plaintiffs, an American supplier of clothing and military equipment and the supplier's Chinese distributor, argued that Nepal's freezing of their assets came within the commercial activities exception. Chettri v. Nepal Rastra Bank, 834 F.3d 50, 55 (2d Cir. 2016). As in Nelson, the Second Circuit found the first clause of the exception did not apply because the claim was based on the freezing of assets abroad, not the commercial activity in the United States (there, the procurement of services from a sovereign). Id. at 56–57. The court further held the third clause, at issue in this case, did not apply because the freezing of money was not sufficiently "in connection with" the contract, which had been fully satisfied when the assets were frozen. Id. at 57–58. If anything, Chettri confirms that the procurement of services (including, say, mediation services) by a foreign sovereign is commercial activity; in that case, the plaintiffs' argument failed because of the lack of connection between that activity and the alleged tort. Id.

B. RAKIA Hacked Into Azima's Computers "In Connection With" This Mediation Role, To Gain Advantage In Their Commercial Dealings.

For jurisdiction under this clause of the FSIA, the claims must be based upon an act taken "in connection with" a commercial activity. 28 U.S.C. § 1605(a)(2). This court has not had occasion to define the phrase, and other Circuits have split on how tight a nexus is required. Compare Connecticut Bank of Commerce v. Republic of Congo, 309 F.3d 240, 255 (5th Cir. 2002) (describing the exception as denying immunity for "acts that have *any* connection with a commercial activity" and holding "'in connection with,' means something like 'related to' or 'integral to'") (emphasis added), with Adler v. Federal Republic of Nigeria, 107 F.3d 720, 726 (9th Cir. 1997) (requiring a "'substantive connection' or a 'causal link' to the commercial activity"). The Supreme Court has suggested that the phrase should be interpreted loosely, in line with the Fifth Circuit's "related to" reading. See Nelson, 507 U.S. at 358 (contrasting "a suit 'based upon' commercial activity and one 'based upon' acts performed 'in connection with' such activity" and finding "the former term calls for something more than a mere connection with, *or relation to*, commercial activity") (emphasis added). Regardless, in any reading of the phrase, RAKIA's hack into Azima's computers was "in connection with" Azima's mediation.

First, the overlap in the timing of the hack and key events in the mediation supports their connection. The parties agree Azima's mediation began in the fall of 2015, and the hack began on or around October 14, 2015. Am. Compl. ¶ 26, J.A. 419. As the mediation seemingly stalled out in July 2016, RAKIA threatened Azima that he would be "collateral damage" in its war with Massaad. Id. ¶ 35, J.A. 421–22. Then—and only then, almost a year after hackers began accessing Azima's computers—did the stolen information appear online, on websites disparaging Azima. Id. ¶ 38, J.A. 422. Shortly thereafter, RAKIA demanded $4,162,500 from Azima based on "recently obtained" information it claims is "publically available"—a description belied by the fact that, to

date, RAKIA and its counsel are the only entities known to have this data. Id. ¶ 32, J.A. 421. While RAKIA argues that this overlap is not sufficient to reasonably infer a link, see Appellant's Br. at 18–19, one wonders why a hacker would infiltrate Azima's computers in October 2015, and then sit on the information collected for almost a year. RAKIA also offers no explanation as to why RAKIA and its counsel, but no one else, has a copy of this confidential information, and why RAKIA and its counsel, but no one else, have used this information to demand millions of dollars from Azima. Am. Compl. ¶¶ 40, 49, J.A. 423, 425.

The connection to the mediation is further reinforced by the websites created to disparage Massaad: within one week of RAKIA's threat, a newly-created website began parroting RAKIA's claims about Massaad from their dispute. Id. ¶ 37, J.A. 422. Shortly after, similar websites appeared linking to BitTorrent sites hosting Azima's data, and the initial post on one of these websites was traced to the UAE. Id. ¶ 38. Together with the chronology of events and lack of alternative explanations offered, these overlaps in timing support the inference that RAKIA hacked into Azima's computers in connection with his role in the mediation, particularly for purposes of deciding a motion to dismiss.

The precedent cited by RAKIA does not bolster its position. The asserted commercial activity in Garb occurred long after the acts giving rise to the suit: the suit arose out of the seizure of the plaintiffs' property by Poland during World War II, but the commercial activity alleged was contemporary sales to private buyers. Garb v. Republic of Poland, 440 F.3d 579, 586 (2d Cir. 2006); see also Garb v. Republic of Poland, 207 F.Supp.2d 16, 31 (E.D.N.Y. 2002) (describing the asserted commercial activities). There, six decades separated the basis of the suit and the commercial activity; here, in contrast, the hacking occurred at the same time, and in fact, directly because Azima's mediation was losing steam. Similarly, in Chettri, the underlying commercial

activity was a contract that had already been completely performed at the time of the alleged tort, thus making it "tangential" and insufficiently undertaken "in connection with" the tortious action. Chettri v. Nepal Rastra Bank, 834 F.3d 50, 57 (2d Cir. 2016). Rubin, which provided the language adopted by other Circuits to describe the required nexus, held that tort claims concerning the design and construction of a building were not sufficiently related to a loan transaction to acquire an ownership interest in the already-constructed building. Federal Ins. Co. v. Richard I. Rubin & Co., 12 F.3d 1270, 1290 (3d Cir. 1993). In all of these cases, the commercial activity bore no relation to the gravamen of the actions. In contrast, RAKIA's hack occurred for the duration of the mediation, the information gleaned from it was only used as the mediation failed, and RAKIA used the stolen information to assert commercial leverage over Azima, all of which speak to a much tighter nexus than those deemed insufficient in other cases.

C. RAKIA's Hack Into Azima's Computers Caused a Direct Effect in the United States.

The final requirement under the FSIA exception is that the acts upon which the suit is based must cause a "direct effect in the United States." 28 U.S.C. § 1605(a)(2). The term "direct effect" does not "contain[] any unexpressed requirement of 'substantiality' or 'foreseeability,'" rather, "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity." Republic of Argentina v. Weltover, 504 U.S. 607, 618 (1992). Because RAKIA's hack damaged Azima's U.S.-based computers, leading to their replacement, and the stolen information was used against Azima in the U.S., this requirement is met.

In this case, the attackers sent malware from an IP address in the United States; the malware made contact with Azima's computers when they were in the United States; and the injuries from the hack, including the damage to Azima's systems, conversion of data, and costs incurred to replace the computers, were experienced in the United States. Am. Compl. ¶¶ 26, 33, 78, J.A. 419,

421, 432. These injuries are serious: because of RAKIA's hack, Azima was forced to hire computer experts to respond to the hack, replace all infected computers, and stop the regular functioning of his businesses to address the issue. Id. ¶ 33, J.A. 421. Then, RAKIA used the purloined data to demand $4,162,500 from Azima. Id. at ¶ 49, J.A. 425. This indicates the value of the damage RAKIA caused as a direct result of the cyberattack.

Bell Helicopter and Antares Aircraft do not change the analysis. Bell Helicopter concerned the tortious interference with an American patentholder's property right, based on Iran's manufacture and sale of helicopters within Iran. Bell Helicopter Textron, Inc. v. Islamic Republic of Iran, 734 F.3d 1175, 1178 (D.C. Cir. 2013). Antares Aircraft concerned a case of tortious interference with an American partial owner's property interest in a plane in Nigeria where, "all legally significant acts took place in Nigeria." Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33, 36 (2d. Cir. 1993). In both cases, the only connection to the United States was the citizenship of the holder of the property right; the plaintiffs pled no other facts connecting the action to the United States. See Bell Helicopter, 734 F.3d at 1178; Antares, 999 F.2d at 36. In contrast, RAKIA's tort caused a direct effect in the United States because it was launched from U.S. IP addresses and targeted the property of a U.S. citizen physically present in the United States, causing serious damage. See Am. Compl. ¶¶ 26, 33, 78, J.A. 419, 421, 432.

RAKIA also reads Bell Helicopter to implicitly require a "significant" effect. Appellant's Br. at 22. First, this contradicts Weltover's proscription of any "unexpressed requirement of substantiality" in the direct effects prong—the effect must merely be more than "purely trivial." 504 U.S. at 618. Second, RAKIA's reading is based on the following statement: "[A]n American individual … suffer[ing] some financial loss from a foreign tort cannot, standing alone, suffice to

trigger the exception." Bell Helicopter, 734 F.3d at 1184. However, Azima's argument does not turn on his American citizenship, standing alone.

In fact, the tort's domestic locus means this is no "foreign tort" at all. RAKIA cites EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A., 894 F.3d 339 (D.C. Cir. 2018), to say "the foreign 'locus' of the tort is irrelevant." Appellant's Br. at 11–12. However, the inquiry of a tort's locus and effects are deeply intertwined. See Atlantica Holdings, Inc. v. Sovereign Wealth Fund, 813 F.3d 98, 109 (2d Cir. 2016) ("A determination that a tort's locus is the United States is . . . often a determination that the plaintiff has been injured in this country by the defendant's tortious actions—meaning that those actions caused a 'direct effect'."). The locus of a tort is generally "where the last event necessary to make an actor liable for an alleged tort takes place," typically the location of the injury. Id. (quoting Restatement of Conflict of Laws § 377 (1934)). The locus of RAKIA's tort is the United States, because the effects of the hack were felt here.

Finally, finding RAKIA's tort to have caused a direct effect poses no risk of creating "small international courts of claim." Odhiambo v. Republic of Kenya, 764 F.3d 31, 39 (D.C. Cir. 2014). In Odhiambo, the plaintiff was injured in Kenya, prior to seeking asylum in the United States; the Court stated allowing suits in like cases, "as the result of some intervening event such as the plaintiff's move to this country … [would] undermine Congress's objective of avoiding turning U.S. courts into 'small international courts of claims.'" Id. at 38-39 (citations omitted). Azima lives and suffered his injury in the U.S., making Odhiambo's warning inapposite.

[…]

CONCLUSION

For the foregoing reasons, we ask this Court to affirm the denial of the motion to dismiss for lack of subject matter jurisdiction.

Applicant Details

First Name	**Zachary**
Middle Initial	**A**
Last Name	**Kayal**
Citizenship Status	**U. S. Citizen**
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Address	**Address** Street **280 West 115th Street, Apt. 2** City **New York** State/Territory **New York** Zip **10026** Country **United States**
Contact Phone Number	**6105171533**

Applicant Education

BA/BS From	**Yale University**
Date of BA/BS	**May 2018**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Columbia Gender and Sexuality Moot Court Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **No**
Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Glass, Maeve
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Beth Robinson
United States Court of Appeals for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am a rising third-year student and staff editor on the *Journal of Law and Social Problems* at Columbia Law School. I write to apply for a clerkship in your chambers for the 2024-2025 term or any term thereafter. Though I have not yet practiced as an attorney, I worked for three years in law-related positions before entering law school. As such, I am confident that I would make a strong addition to your chambers.

I hope to pursue a career in impact litigation to advance the rights of women and LGBTQ+ people, and I aim to improve my understanding of effective appellate advocacy by serving as a clerk. Your work to secure the nation's first same-sex civil unions and to achieve marriage equality in Vermont is inspiring and led me to apply to your chambers. At Columbia, I have honed my research and writing skills by working as a research assistant, a legal writing tutor, and a competitor for the Gender and Sexuality Moot Court Team. I would appreciate the opportunity to apply these skills in a clerkship position.

Enclosed please find a resume, law transcript, undergraduate transcript, and writing sample. Also enclosed are letters of recommendation from Professors Maeve Glass (212-854-0073, maeve.glass@law.columbia.edu), David Pozen (212-854-0438, dpozen@law.columbia.edu), and Donald Verrilli (202-220-1101, donald.verrilli@mto.com).

Thank you for your consideration. Please do not hesitate to contact me should you need any additional information.

Respectfully,

Zachary Kayal

Zachary Ananda Kayal

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EDUCATION

COLUMBIA LAW SCHOOL, New York, NY
J.D., expected May 2024
Honors: James Kent Scholar 2022–2023 (for outstanding academic achievement)
Harlan Fiske Stone Scholar 2021–2022 (for superior academic achievement)
Max Berger '71 Public Interest/Public Service Fellow
Jeffrey Williams Memorial Prize for Critical Rights Analysis
Activities: *Columbia Journal of Law and Social Problems*, Staff Editor
Columbia Gender & Sexuality Moot Court, Team Member (1L) and Coach (2L)
OutLaws, Vice President for Public Policy
Student Public Interest Network, Advocacy Chair
Teaching Fellow for Professors Maeve Glass (Property) & Elana Sigall (Higher Education Law)
Research Assistant, Law, Rights, and Religion Project
Writing Center, Fellow
Publication: *He/She/They "Say Gay": A First Amendment Framework for Regulating Classroom Speech on Gender and Sexuality*, 57 COLUM. J.L. & SOC. PROBS. (forthcoming)

YALE UNIVERSITY, New Haven, CT
B.A. in Sociology, with distinction, received May 2018
Activities: The Whiffenpoofs of Yale (a cappella)
Yale Precision Marching Band

EXPERIENCE

Americans United for Separation of Church and State Washington, DC
Constitutional Litigation Intern May 2023–Present

The Legal Aid Society, Bronx Neighborhood Office New York, NY
Housing Justice Extern August 2022–December 2022
Assisted low-income tenants facing eviction in Bronx County Housing Court. Represented a single mother in a summary nonpayment proceeding, drafting motions and achieving dismissal for the client and her children.

American Civil Liberties Union, Ruth Bader Ginsburg Liberty Center New York, NY
Legal Intern May 2022–August 2022
Drafted memoranda to inform strategic planning on LGBTQ and reproductive rights. Researched pharmacists' criminal liability for mailing abortion pills to hostile states, the constitutionality of school policies requiring teachers to use students' gender-affirming pronouns, and the viability of free-exercise challenges to antidiscrimination laws.

Advocates of Routt County Steamboat Springs, CO
Legal Intern January 2021–May 2021
Staffed domestic violence and sexual assault (DVSA) crisis hotline. Produced guidance materials on DVSA reporting mechanisms. Conducted legal research to support community education programs and criminal justice reform efforts.

Colorado Attorney General's Office Denver, CO
Pre-Law Intern August 2020–December 2020
Supported efforts to improve employment opportunities for Coloradans with criminal records.

McAllister Olivarius Maidenhead, United Kingdom
Legal Analyst August 2018–July 2020
Researched clients' claims for discrimination, harassment, sexual violence, and child abuse. Drafted demand letters, complaints, and affidavits for cases against major corporations and universities.

INTERESTS: Long-distance running, hiking, singing, film photography, baking

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CLS TRANSCRIPT (Unofficial)

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Program: Juris Doctor

Zachary A Kayal

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6905-1	Antidiscrimination Law	Johnson, Olatunde C.A.	3.0	A
L6241-1	Evidence	Capra, Daniel	4.0	A-
L6867-1	Independent Moot Court Coaching	Bernhardt, Sophia	1.0	CR
L6184-1	Law After Neoliberalism	Thomas, Kendall	3.0	A-
L6822-1	Teaching Fellows	Glass, Maeve	4.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6789-1	Ex. Housing Justice: The Right to Counsel in Housing Court	Solivan, Jackeline; Tropp, Matthew	2.0	A+
L6789-2	Ex. Housing Justice: The Right to Counsel in Housing Court - Fieldwork	Solivan, Jackeline; Tropp, Matthew	2.0	CR
L6867-1	Independent Moot Court Coaching	Bernhardt, Sophia	1.0	CR
L6169-1	Legislation and Regulation	Bulman-Pozen, Jessica	4.0	A
L6675-1	Major Writing Credit	Pozen, David	0.0	CR
L8659-1	S. The Roberts Court [Minor Writing Credit - Earned]	Metzger, Gillian; Verrilli, Donald B.	2.0	A
L6683-1	Supervised Research Paper	Pozen, David	2.0	A
L6822-1	Teaching Fellows	Balganesh, Shyamkrishna	1.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-1	Constitutional Law	Glass, Maeve	4.0	B+
L6108-1	Criminal Law	Godsoe, Cynthia	3.0	A
L6173-1	Critical Legal Thought	Franke, Katherine M.	3.0	B+
L6121-37	Legal Practice Workshop II	Wang, Alice	1.0	HP
L6116-1	Property	Balganesh, Shyamkrishna	4.0	A
L6874-1	The Columbia Gender and Sexuality Moot Court	Wang, Alice	0.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-3	Legal Methods II: Methods of Statutory Drafting and Interpretation	Ginsburg, Jane C.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-1	Civil Procedure	Cleveland, Sarah	4.0	A-
L6105-3	Contracts	Bagchi, Aditi	4.0	A
L6113-4	Legal Methods	Strauss, Peter L.	1.0	CR
L6115-4	Legal Practice Workshop I	Dodge, Joel; Rieke, Lena	2.0	HP
L6118-1	Torts	Liebman, Benjamin L.	4.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 60.0
Total Earned JD Program Points: 60.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	James Kent Scholar	2L
2022-23	Jeffrey Williams Memorial Prize	2L
2021-22	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	13.5

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SEAL OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK

Columbia College, Engineering and Applied Science, General Studies, Graduate School of Arts and Sciences, International and Public Affairs, Library Service, Human Nutrition, Nursing, Occupational Therapy, Physical Therapy, Professional Studies, Special Studies Program, Summer Session
A, **B**, **C**, **D**, **F** (excellent, good, fair, poor, failing). NOTE: Plus and minus signs and the grades of **P** (pass) and **HP** (high pass) are used in some schools. The grade of **D** is not used in Graduate Nursing, Occupational Therapy, and Physical Therapy.

American Language Program, Center for Psychoanalytic Training and Research, Journalism
P (pass), **F** (failing). Grades of **A**, **B**, **C**, **D**, **P** (pass), **F** (failing) — used for some offerings from the American Language Program Spring 2009 and thereafter.

Architecture
HP (high pass), **P** (pass), **LP** (low pass), **F** (failing), and **A**, **B**, **C**, **D**, **F** — used June 1991 and thereafter **P** (pass), **F** (failing) — used prior to June 1991.

Arts
P (pass), **LP** (low pass), **F** (fail). **H** (honors) used prior to June 2015.

Business
H (honors), **HP** (high pass), **P1** (pass), **LP** (low pass), **P** (unweighted pass), **F** (failing); plus (+) and minus (-) used for H, HP and P1 grades Summer 2010 and thereafter.

College of Physicians and Surgeons
H (honors), **HP** (high pass), **P** (pass), **F** (failing).

College of Dental Medicine
H (honors), **P** (pass), **F** (failing).

Law
A through **C** [plus (+) and minus (-) with **A** and **B** only], **CR** (credit - equivalent to passing). **F** (failing) is used beginning with the class which entered Fall 1994. Some offerings are graded by **HP** (high pass), **P** (pass), **LP** (low pass), **F** (failing). **W** (withdrawn) signifies that the student was permitted to drop a course, for which he or she had been officially registered, after the close of the Law School's official Change of Program (add/drop) period. It carries no connotation of quality of student performance, nor is it considered in the calculation of academic honors.
E (excellent), **VG** (very good), **G** (good), **P** (pass), **U** (unsatisfactory), **CR** (credit) used from 1970 through the class which entered in Fall 1993.

Any student in the Law School's Juris Doctor program may, at any time, request that he or she be graded on the basis of Credit-Fail. In such event, the student's performance in every offering is graded in accordance with the standards outlined in the school's bulletin, but recorded on the transcript as Credit-Fail. A student electing the Credit-Fail option may revoke it at any time prior to graduation and receive or request a copy of his or her transcript with grades recorded in accordance with the policy outlined in the school bulletin. In all cases, the transcript received or requested by the student shall show, on a cumulative basis, all of the grades of the student presented in single format – i.e., all grades shall be in accordance with those set forth in the school bulletin, or all grades shall be stated as Credit or Fail.

Public Health
A, **B**, **C**, **D**, **F** - used Summer 1985 and thereafter. **H** (honors), **P** (pass), **F** (failing) — used prior to Summer 1985.

Social Work
E (excellent), **VG** (very good), **G** (good), **MP** (minimum pass), **F** (failing).
A though **C** is used beginning with the class which entered Fall 1997. Plus signs used with **B** and **C** only, while minus signs are used with all letter grades. The grade of **P** (pass) is given only for select classes.

OTHER GRADES USED IN THE UNIVERSITY

AB = Excused absence from final examination.

AR = Administrative Referral awarded temporarily if a final grade cannot be determined without additional information.

AU = Audit (auditing division only).

CP = Credit Pending. Assigned in graduate courses which regularly involve research projects extending beyond the end of the term. Until such time as a passing or failing grade is assigned, satisfactory progress is implied.

F* = Course dropped unofficially.

IN = Work Incomplete.

MU = Make-Up. Student has the privilege of taking a second final examination.

R = For the Business School: Indicates satisfactory completion of courses taken as part of an exchange program and earns academic credit.

R = For Columbia College: The grade given for course taken for no academic credit, or notation given for internship.

R = For the Graduate School of Arts and Sciences: By prior agreement, only a portion of total course work completed. Program determines academic credit.

R = For the School of International and Public Affairs: The grade given for a course taken for no academic credit.

UW = Unofficial Withdrawal.

UW = For the College of Physicians and Surgeons: Indicates significant attempted coursework which the student does not have the opportunity to complete as listed due to required repetition or withdrawal.

W = Withdrew from course.

YC = Year Course. Assigned at the end of the first term of a year course. A single grade for the entire course is given upon completion of the second term. Until such time as a passing or failing grade is assigned, satisfactory progress is implied.

OTHER INFORMATION

NOTE: All students who cross-register into other schools of the University are graded in the **A, B, C, D, F** grading system regardless of the grading system of their own school, except in the schools of Arts (prior to Spring 1993) and in Journalism (prior to Autumn 1992), in which the grades of P (pass) and **F** (failing) were assigned. Notations at the end of a term provide documentation of the type of separation from the University.

% of **A** Effective fall 1996: Transcripts of Columbia College students show the percentage of grades in the **A** (**A+**, **A**, **A-**) range in all classes with at least 12 grades, the mark of **R** excluded. Calculations are taken at two points in time, three weeks after the last final examination of the term and three weeks after the last final of the next term. Once taken, the percentage is final even if grades change or if grades are submitted after the calculation. For additional information about the grading policy of the Faculty of Columbia College, consult the College Bulletin.

KEY TO COURSE LISTINGS

A course listing consists of an area, a capital letter(s) (denotes school bulletin) and the four digit course number (see below).

*The **capital letter** indicates the University school, division, or affiliate offering the course:*

A	Graduate School of Architecture, Planning, and Preservation
B	School of Business
BC	Barnard College
C	Columbia College
D	College of Dental Medicine
E	School of Engineering and Applied Science
F	School of General Studies
G	Graduate School of Arts and Sciences
H	Reid Hall (Paris)
J	Graduate School of Journalism
K	School of Library Services/Continuing Education (effective Fall 2002)
L	School of Law
M	College of Physicians and Surgeons, Institute of Human Nutrition, Program in Occupational Therapy, Program in Physical Therapy, Psychoanalytical Training and Research
N	School of Nursing
O	Other Universities or Affiliates/Auditing
P	School of Public Health
Q	Computer Technology/Applications
R	School of the Arts
S	Summer Session
T	School of Social Work
TA-TZ	Teachers College
U	School of International and Public Affairs
V	Interschool Course
W	Interfaculty Course
Y	Teachers College
Z	American Language Program

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*The **first digit** of the course number indicates the level of the course, as follows:*

0	Course that cannot be credited toward any degree
1	Undergraduate course
3	Undergraduate course, advanced
4	Graduate course open to qualified undergraduates
5	Graduate course open to qualified undergraduates
6	Graduate course
7	Graduate course
8	Graduate course, advanced
9	Graduate research course or seminar

Note: Level Designations Prior to 1961:
1-99 Undergraduate courses
100-299 Lower division graduate courses
300-999 Upper division graduate courses

The term designations are as follows:
X=Autumn Term, Y=Spring Term, S=Summer Term
Notations at the end of a term provide documentation of the type of separation from the University.

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June 08, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write to enthusiastically recommend Zachary Kayal (Columbia '24) as a candidate for a judicial clerkship. I have had the privilege to work closely with Zak over the past year and a half, having taught Zak as a student in my first-year Constitutional Law course and then collaborated with him when he served as a Teaching Assistant for my Property course this past spring. Through these interactions, I have had the opportunity to observe firsthand Zak's outstanding analytical, writing, and oral communication skills, as well as his unrivaled work ethic, professionalism, and collegiality. A graduate of Yale College and a James Kent Scholar at Columbia Law School, Zak possesses all the qualities that would make him an excellent clerk.

Zak's exemplary analytical and writing skills were on full display when he wrote what I have since circulated among students as a model answer in my Property course. Drawing on a recent present interest and future estates case in Texas involving the interpretation of an ambiguous conveyance, Zak deftly honed in on the salient facts. While other students might have avoided the legal complexities, Zak embraced the technicalities with enthusiasm. As he explained later to me, he relished the challenge of constructing legal arguments within the bounded formalities of the estates system. Then, writing in succinct and well-organized prose, Zak predicted how the parties might articulate the issues to advance their respective claims, before stating the rules of decision that each side would propose to resolve the issue. Zak paired this close doctrinal analysis with a thoughtful incorporation of policy arguments, before offering his own reasoned recommendation as to how a judge would be likely to decide the case.

In addition to possessing these outstanding analytical and writing skills, Zak has excellent communication skills. During his time as a Teaching Assistant, for example, I observed Zak lead a classroom discussion with professionalism and confidence. Speaking slowly and with clarity, Zak began by outlining the goals of the session, before diving into the hypothetical that he had prepared for the class. A careful listener and fellow at the Writing Center, Zak fielded questions from students with ease, responding to their sources of confusion with clear statements of doctrine. Zak also demonstrated an ability to think on his feet, as he built upon students' tentative answers to develop a more complete and in-depth analysis, pausing to solicit suggestions from students as to how to analogize and distinguish between previous cases. Throughout, Zak's professionalism created a warm and collegial learning environment, in which students were encouraged to participate as active learners.

Beyond these excellent qualities, Zak has an indefatigable work ethic that distinguishes him from his peers. Throughout the semester, Zak took the initiative to go above and beyond the duties of his expected role as a Teaching Assistant. For example, in response to students' questions about how they might pursue their interests in Property law outside of the classroom, Zak created a guide of resources that he then published on the course website. Organized by subject area, the guide included a list of organizations where students might pursue Property-related legal work, as well as courses that they might take in their second and third years in law school. Zak also included a list of upper-level students who were willing to speak about their experiences in particular areas of Property law. In addition to creating this guide, Zak regularly emailed me news articles or cases that were relevant to the material we would be discussing in class, with excellent suggestions for how I might incorporate it into the scheduled reading assignments.

I have no doubt Zak would be a superb clerk. He is an academically gifted aspiring public interest lawyer, as well as a funny, warm, and compassionate colleague with whom it has been a joy to work. If I can be of any further assistance in your review of Zak's application, please feel free to contact me at (202) 386-2097.

With best regards,

Maeve Glass

Maeve Glass - maeve.glass@law.columbia.edu - _212_ 854-0073

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 08, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Re: Zachary "Zak" Kayal

Dear Judge Robinson:

It is my pleasure to recommend Columbia Law School rising 3L Zachary "Zak" Kayal for a clerkship in your chambers. Zak is brilliant, passionate about public interest law, and a beautiful writer; I recommend him on the strongest possible terms.

I know Zak principally from supervising his note, which will be published in the next volume of the Columbia Journal of Law & Social Problems and which was recently awarded the law school's prize for best student paper on a topic in critical legal theory. Zak's note juxtaposes the recent wave of state laws requiring teachers to use gender-affirming pronouns ("pronoun policies") with the wave of laws forbidding teachers from talking about gender and sexuality topics ("Don't Say Gay" policies). At first glance, it might seem that these two sets of laws should be treated identically for First Amendment purposes, given that they both regulate teachers' classroom speech. But Zak argues that the laws are distinguishable in light of their discrepant effects on students' expressive interests and teachers' pedagogic interests. Don't Say Gay laws, Zak contends, are more likely to violate the First Amendment.

Whether or not one agrees with its bottom line, which unavoidably depends in part on empirical predictions about policies that haven't yet gone into effect, the note is a tour de force. First Amendment case law on school speech and public employee speech is notoriously complex. It is therefore all the more impressive how the note manages to synthesize these bodies of law, summarize them with rigor and clarity, apply them to a new context, and draw distinctions grounded both in the doctrine's internal logic and in the academic literature's external resources. It was a pleasure talking with Zak about the project at every stage, and an easy call to give the final product an A. While the note won the award for best paper in critical theory, I think it is even more deserving of an award—which doesn't exist at Columbia—for the best doctrinal paper of the year. Zak's level of doctrinal proficiency is off the charts.

The other way I've encountered Zak at Columbia is in his role as an advocate for public interest–oriented students, in which context he has been equally impressive. Zak is devoted to public interest causes in general and LGBTQ+ causes in particular. In addition to being a leader of the OutLaws student group and the Gender and Sexuality Moot Court team and a Public Interest/Public Service Fellow here at Columbia, Zak has been the advocacy chair of the Student Public Interest Network. As advocacy chair, he has worked with the law school's leadership to enhance financial supports for students from low-income backgrounds who want to pursue public interest careers but worry about the financial feasibility. I served as one of the law school's vice deans until recently and so found myself in numerous meetings with Zak about these issues. All of the students involved in these conversations were dedicated and thoughtful, but Zak stood out for his remarkable command of all the relevant law school and governmental policies, as well as his remarkably nuanced and constructive understanding of which sorts of reforms would be realistic yet impactful. My faculty colleagues and I learned more from Zak in these meetings than he learned from us.

Zak has flourished at Columbia in other respects as well. I am not the first person on the faculty to notice the strength of his writing, as he received a grade of High Pass for both semesters of the 1L Legal Practice Workshop and was chosen to serve as a Writing Center Fellow. And after collecting a pair of B+'s in his 1L spring, Zak has received all A's from that point forward. Indeed, I believe his GPA this past 2L year was a perfect 4.0.

Zak is unusually gifted outside the law, too. As an undergraduate at Yale, he was a member of the prestigious Whiffenpoofs a cappella singing group (he also plays a mean alto sax) and managed the group's world tour. True to his rural Colorado roots, Zak loves the outdoors and has already visited more than 30 national parks as part of a lifelong mission to visit them all. And Zak is an excellent baker as well. It will be either the good or bad fortune of whichever judge hires him that a steady stream of delicious cakes may be coming to chambers.

In short, Zak is extraordinary. He is devoted to social justice but at the same time intensely practical, institutionally savvy, never self-righteous, and always fun and stimulating to talk to. And he is simply fantastic as both an analyst of case law and a legal writer. I see zero negatives or worry points in this case, only strengths. Zak is as sure a bet as they come to be a top-notch clerk.

If I can be of any further assistance, please do not hesitate to contact me.

Respectfully,

David Pozen

David Pozen - dpozen@law.columbia.edu - 2128540438

June 6, 2023

RE: Zachary Kayal

Dear Judge:

I write in support of rising 3L Columbia Law student **Zachary "Zak" Kayal** for a clerkship in your chambers. I recommend Zak in the strongest possible terms. Of the students I have encountered teaching at Columbia over the past 6 years since leaving the government, Zak is at the top. He is a powerful legal thinker, is openminded and thoughtful in his approach to hard legal questions, and is a delightful person.

Zak was a student in the Roberts Court seminar that I co-teach each year with Gillian Metzger. It is a demanding course and a challenging intellectual environment. The reading load is quite substantial, most of the students are 3Ls (generally in the upper academic ranks of their class), and class discussions move at fast clip and can be quite intense. We admitted Zak to the class based on the strength of his 1L performance and the exceptional range and depth of his public interest commitments. It proved to be a wise decision. Week in and week out, Zak was a fantastic contributor to the class discussion. He was always thoroughly prepared, offered incisive commentary quite often took positions that one might not have expected given his jurisprudential and ideological inclinations, and was unfailingly respectfully (gracious really) in his interactions with other members of the class. Zak was a frequent visitor during office hours, and I particularly enjoyed those conversations. Early in the semester he expressed a good deal of trepidation about whether he could keep up with the class, given that most of its members were leading 3L students. The humility was endearing, particularly given that he was often leading the way in class discussions. Every conversation I had with Zak left me impressed with the depth of his engagement with the law and his seriousness of purpose.

Given all that, it was no surprise that Zak wrote an exceptionally strong final paper that reflected a great deal about what makes Zak special. The paper explored the connections (or more precisely the lack of connection) between the Roberts Court's government speech cases (such as *Garcetti*) and its decisions in the public sector union cases (*Harris* v. *Quinn* and *Janus* v. *AFSCME*) and religious expression cases (*Kennedy* v. *Bremerton School Dist.*). The paper was carefully reasoned, beautifully written, and really thoughtful. Overall his performance ranked him at the top of the class.

I also learned from my conversations with Zak, that he is a true leader in the law school community, with a focus on public interest causes general and LGBTQ+ causes in particular—serving as a leader of the OutLaws student group and the Gender and Sexuality Moot Court team and a Public Interest/Public Service Fellow. And I gather from conversations with faculty members that he has been equally thoughtful and mature in those roles as well.

For all these reasons, I have every confidence that Zak possesses all the traits needed to be an exceptionally law clerk. And I am equally confident that you will enjoy his company immensely.

I would be delighted to follow up with you about Zak if that would be helpful.

Sincerely,

/s/ Donald B. Verrilli, Jr.

Donald B. Verrilli, Jr.

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ZACHARY KAYAL
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CLERKSHIP APPLICATION WRITING SAMPLE

This writing sample is an excerpt of my Note, which sets forth a novel First Amendment framework for evaluating regulations of public educators' classroom speech about gender and sexuality. In this Note, I compare anti-queer curriculum ("Don't Say Gay") laws that prohibit educators from discussing gender and sexuality with school pronoun policies that require educators to use transgender students' gender-affirming names and pronouns. The excerpt below includes Parts I and II, which discuss the constitutional standards relevant to educators' classroom speech. This Note was advised by Professor David Pozen; I also received high-level feedback from a student editor from the *Columbia Journal of Law and Social Problems*. This Note has been selected for publication in the *Journal* in fall 2023 and received Columbia Law School's Jeffrey Williams Memorial Prize for Critical Rights Analysis.

I: First Amendment Standards for Regulations of Classroom Speech

Though the Supreme Court has frequently discussed the First Amendment rights of students,[1] it has yet to specify a standard for evaluating regulations of educators' curricular speech in public schools and universities. The courts of appeal consequently vary in their approaches, adopting one of two standards developed in other contexts. Most apply the public-employee speech doctrine established in *Pickering v. Board of Education*[2] and its progeny. But a minority instead rely on *Hazelwood School District v. Kuhlmeier*'s[3] standard for school-sponsored student speech, extending it to cover speech by educators bearing the imprimatur of the institution.[4]

Though their particularities differ, both standards share the same core concern: ensuring that the state can maintain an effective learning climate in its public classrooms. But what speech by educators constitutes a sufficient threat to the educational environment to warrant restriction is often unclear, making it difficult to parse the constitutionality of different regulations of educators' speech.[5] This Part summarizes *Pickering* and *Hazelwood* as applied to the classroom contexts. Part II explains that the standards' uncertainties can be resolved by hinging the extent of educators' First Amendment protections on the effect of their speech on students' own expression and on the overall expressive environment of the classroom.

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[1] *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[2] 391 U.S. 563 (1968).

[3] 484 U.S. 260 (1988).

[4] At least one scholar has argued that a third doctrinal approach to regulations of educators' classroom speech exists, modelled on the government speech doctrine developed in Rust v. Sullivan, 500 U.S. 173 (1995) and Rosenberger v. University of Virginia, 515 U.S. 819 (1995). *See* Nicholas K. Tygesson, Note, *Cracking Open the Classroom Door: Developing a First Amendment Standard for Curricular Speech*, 107 NW. U.L. REV. 1917 (2013). Under this approach, educators' speech is deemed to be speech by the government lacking any First Amendment protection, as "when the government is the speaker, in the sense that the government is conveying a particular message through a person, that person receives no First Amendment protection." Cal. Teachers Ass'n v. Bd. of Educ., 271 F.3d 1141, n. 6 (9th Cir. 2001). But the only two courts of appeal to adopt this approach – the Third and Ninth Circuits – have since abandoned it in favor of the public-employee speech doctrine. *Compare* Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1014 (9th Cir. 2000), *and* Edwards v. Cal. Univ., 156 F.3d 488, 491-492 (3d. Cir. 1998), *with* Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 960-61 (9th Cir. 2011), *and* Borden v. Sch. Dist., 523 F.3d 153, 168-69 (3d Cir. 2008). As such, it does not merit discussion in this Note.

[5] *See, e.g.*, Tygesson, *supra* note 4, at 1921 (lamenting the lack of clarity and inconsistency in lower courts' treatment of public educators' curricular speech); *see also* Jason R. Wiener, *The Right to Teach, the Right to Speak, and the Right to be a Valuable Contributor to a Child's Upbringing: Public School Teachers' First Amendment Right to Free Speech and Expression*, 32 W. ST. U. L. REV. 105, 106 (2004); Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 16-19 (2001).

A: *PICKERING* AND THE PUBLIC-EMPLOYEE SPEECH DOCTRINE

In a majority of circuits, courts evaluate regulations of public-school teachers' and public-university professors' speech in the classroom under the public-employee speech doctrine first established in *Pickering v. Board of Education*.[6] Under that doctrine, a public employee is eligible for First Amendment speech protections if she speaks both (1) as a private citizen and (2) on a matter of public concern.[7] A government employer may only restrict such expression if (3) the government's regulatory interest in maintaining the efficiency of its public services outweighs the speech interests of the employee.[8] This section summarizes federal courts' treatment of each of these three prongs.

1. *Determining whether Curricular Speech is Spoken "as a Citizen"*

To receive any First Amendment protection for her speech, a public employee must speak as a private citizen, rather than in her public capacity. In *Garcetti v. Ceballos*, the Supreme Court clarified that public employees do not speak as citizens, and are thus "not insulate[d] . . . from employer discipline," when they speak "pursuant to their official duties."[9] But the *Garcetti* Court declined to decide whether its analysis applied to "expression related to academic scholarship or classroom instruction," which may "implicate[] additional constitutional interests."[10] Every circuit court to apply the public-employee speech doctrine to public-university professors' in-class speech has thus held such speech to be exempt from *Garcetti*'s "official duties" test.[11] Courts and scholars are divided, however, as to whether *Garcetti*

[6] 391 U.S. 563 (1968).
[7] *Id.* at 568; Connick v. Myers, 461 U.S. 138, 156-157 (1983).
[8] *Pickering*, 391 U.S. at 568; Lane v. Franks, 573 U.S. 228, 236-37 (2014).
[9] 547 U.S. 410, 421 (2006).
[10] *Id.* at 425; *see also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424 (2022) (acknowledging that "questions of academic freedom may or may not involve additional First Amendment interests beyond those captured by [*Garcetti*'s] framework.").
[11] The Fourth, Fifth, Sixth, and Ninth Circuits have each applied an "academic exception" to *Garcetti* to find that professors' speech related to scholarship or teaching is protected citizen-speech for First Amendment purposes. *See* Inara Scott et al., *First Do No Harm:* Meriwether v. Hartop *and Academic Freedom*, 71 AM. U.L. REV. 977, 1021 (2022) (citations omitted). The Third and Seventh Circuits have also acknowledged the likely existence of such an exception, though they have not applied it. *See* Abcarian v. McDonald, 617 F.3d 931, 938 n. 5 (7th Cir. 2010); Gorum v. Sessoms, 561 F.3d 179, 186 n. 6 (3d. Cir. 2009). No circuit has interpreted *Garcetti* to deny First Amendment protections to public-university professors' classroom actions related to scholarship or teaching. *See* Gabrielle Dohmen, Comment, *Academic Freedom and Misgendered Honorifics in the Classroom*, 89 U. CHI. L. REV. 1557, 1569-70 (2022).

similarly exempts schoolteachers' curricular speech in public K-12 classrooms from its "official duties" test.[12] Because this Note is primarily concerned with the balancing analysis of *Pickering*'s third step, it assumes that educators' speech in both K-12 and university classrooms is excepted from *Garcetti* and is eligible for protection by the First Amendment.

2. *Determining whether Curricular Speech Addresses a "Matter of Public Concern"*

The courts of appeal also disagree as to whether and when educators' classroom speech addresses a matter of public concern such that it remains eligible for First Amendment protection under *Pickering*'s balancing analysis. The Supreme Court has articulated a broad standard, casting speech as on a matter of public concern "when it can fairly be considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest[.]"[13] Most courts of appeal correspondingly define "matters of public concern" broadly in the context of educators' classroom speech.[14]

Florida recently asserted that *Garcetti* applies to its public university faculty's curricular speech, denying any First Amendment protection against state regulation thereof. *See* Defs.' Resp. in Opp'n to Pls.' Mot. for a Prelim. Inj. at 11-12, Pernell v. Fla. Bd. of Govs. of the State Univ. Sys., No. 4:22-cv-304, 2022 U.S. Dist. LEXIS 208374 (N.D. Fla. Nov. 17, 2022). But most scholars agree that professors' curricular speech is protected citizen-speech. *See, e.g.*, Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of* Garcetti v. Ceballos *to Public University Faculty*, 59 CATH. U. L. REV. 125, 165 (2009); Nick Cordova, *An Academic Freedom Exception to Government Control of Employee Speech*, 22 FEDERALIST SOC'Y 284 (2021); Michael A. Sloman, Note, *"A Kind of Continuing Dialogue": Reexamining the Audience's Role in Exempting Academic Freedom from* Garcetti*'s Employee Speech Doctrine*, 55 GA. L. REV. 935, 956-57 (2021).

[12] The Fourth and Ninth Circuits have refused to apply *Garcetti* to K-12 educators' curricular speech. Tess Bissell, Note, *Teaching in the Upside Down: What Anti-Critical Race Theory Laws Tell Us About the First Amendment*, 75 STAN. L. REV. 205, 236 (2023). But the Sixth and Seventh Circuits have applied *Garcetti* to K-12 teachers' classroom speech, denying it any First Amendment protection. *Id.* at 233-234. Though the Fifth Circuit has not addressed the applicability of *Garcetti* to such expression, a pre-*Garcetti* case held that "a public school teacher's speech . . . was not speech in the teacher's role as a citizen and was instead in his role as an employee of the school district," unshielded from employer discipline. Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 799 (5th Cir. 1989) (internal quotations omitted).

[13] Snyder v. Phelps, 562 U.S. 443, 452 (2011) (citing Connick v. Myers, 461 U.S. 138, 147 (1983)). Under this definition, speech addresses a matter of public concern so long as it has more than "purely private significance," *id.*, and is not "solely in the individual interest of the speaker and its specific [] audience." Dun & Bradstreet, Inc. v. Greenmass Builders, Inc., 472 U.S. 749, 762 (1985).

[14] *See, e.g.*, Meriwether v. Hartop, 992 F.3d 492, 508-509 (6th Cir. 2021); Demers v. Austin, 746 F.3d 402, 415 (9th Cir. 2014); Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 964-966 (9th Cir. 2011); Adams v. Trs. of the Univ. of N. Carolina-Wilmington, 640 F.3d 550, 564-65 (4th Cir. 2011).

But two circuits take narrower approaches. The Fifth Circuit has held that, "in the college classroom context, speech that does not serve an academic purpose is not of public concern," and thus not protected by the First Amendment. Buchanan v. Alexander, 919 F.3d 847, 853 (5th Cir. 2019). Proponents of this approach argue that requiring that educators' curricular speech be germane to the course materials to receive protection as speech on a matter of public concern substantially preserves educators' speech freedoms while preventing them from using their public roles to distract from the government's pedagogical mission. Alan K. Chen, *Bureaucracy and Distrust:*

The Sixth Circuit, for example, found a professor's misgendering of a student in the classroom to be speech on a matter of public concern because it "touch[ed] on gender identity," a "hotly contested" topic.[15] And the Supreme Court of Virginia recently found that a schoolteacher's profession of his intent to misgender students was speech as a citizen on a matter of public concern, restriction of which was thus governed by the *Pickering* balancing test.[16] This Note adopts the same approach.

3. *Balancing Educators' and Institutions' Competing Interests*

Per *Pickering*, a public employee's speech as a citizen on a matter of public concern is protected against regulation if the employee's speech interests outweigh the government employer's interest in maintaining the efficient functioning of its public services.[17] In *Connick*, the Supreme Court specified that, under this balancing test, a government employer retains "wide discretion and control over the management of its personnel and internal affairs," including terminating or sanctioning "employees whose conduct hinders efficient operation."[18]

Germaneness and the Paradoxes of the Academic Freedom Doctrine, 77 U. COLO. L. REV. 955, 973-979 (2006). The Fourth Circuit has inverted this approach with respect to K-12 classrooms, holding that "if contested speech *is* curricular in nature, it does *not* constitute speech on a matter of public concern" because "disputes over curriculum constitute ordinary employment disputes" that do not implicate the public interest. Lee v. York Cnty. Sch. Div., 484 F.3d 687, 697 (4th Cir. 2007) (citing Boring v. Buncombe, 136 F.3d 364, 368-69 (4th Cir. 1998)) (emphasis added).

[15] *Meriwether*, 992 F.3d at 506 (citing Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2476 (2018)); *accord Johnson*, 658 F.3d at 966 (holding speech concerning an educator's religious views to be "unquestionably of inherent public concern").

[16] Loudoun Cnty. Sch. Bd. v. Cross, 2021 Va. LEXIS 141, at *18-21 (Va. 2021).

[17] 391 U.S. 563, 568 (1968). In dicta in it its cases concerning compelled union dues as a form of compelled speech, the Supreme Court indicated that this traditional *Pickering* balancing test applies to cases involving a government employer's choice to retroactively sanction one employee for her speech but might not apply to policies proactively compelling the speech of a class of employees. *See Harris v. Quinn*, 573 U.S. 616, 648 (2014); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2474 (2018). As such, it is possible that the Court would find this balancing test not to govern pronoun policies or "Don't Say Gay" laws. But Justice Kagan noted in her *Janus* dissent that the Court is unlikely to modify the public-employee speech doctrine in this way outside the union speech context. *Janus*, 138 S. Ct. at 2494 (Kagan, J., dissenting).

In the classroom context, all but one lower federal court has continued to apply the ordinary *Pickering* balancing analysis, even where the policy at issue proactively regulates the speech of a large class of employees. *Compare, e.g.*, *Meriwether*, 992 F.3d at 509-512 (applying ordinary *Pickering* balancing), *with* Fuller v. Warren Cnty. Educ. Serv. Ctr., 2022 U.S. Dist. LEXIS 25659, at *17 (S.D. Ohio 2022) (quotation omitted) (applying a modified balancing test requiring that the state show a non-conjectural regulatory interest sufficient to outweigh the interests of "both potential audiences and a vast group of present and future employees" potentially subject to the regulation).

[18] 461 U.S. at 151.

In the context of educators' speech in public classrooms, lower federal courts generally define the relevant government interest as the interest in an "efficient and regularly functioning school system,"[19] "one of the most important public services offered by state government."[20] Courts consequently measure an educational institution's interests in restricting educators' curricular speech based on evidence that the speech impedes classroom teaching or otherwise disrupts the learning environment.[21] Lower federal courts have found public educational institutions to have a sufficient interest in restricting educators' classroom speech in cases where educators use profanity and sexually suggestive language,[22] preach about their belief in God,[23] lecture on an anti-war stances,[24] or express opinions on diversity[25] in a disruptive manner unrelated to the course materials.

Courts are particularly inclined to permit restriction of an educator's speech when the speech has a detrimental impact on the educator's relationship with students[26] or "prevent[s] them from learning."[27] Courts of appeal have often found public institutions to have a sufficient interest to regulate educators' classroom speech that harasses or humiliates students, as "[p]rofessors who harass and humiliate students cannot successfully teach them, and . . . [a] university that permits professors to degrade students . . . cannot fulfill its educational functions."[28] The Sixth Circuit, for example, has repeatedly upheld schools and

[19] Anderson v. Evans, 660 F.2d 153, 159 (6th Cir. 1981); *see also* Smith v. Sch. Dist., 158 F. Supp. 2d 599, 608 (E.D. Pa. 2001) (relevant state interest in regulating school volunteer's speech was "in fair and efficient functioning of the . . . school district"); *Fuller*, 2022 U.S. Dist. LEXIS 25659, at *23 (relevant interest was in "efficient operation of [the] school").

[20] Stroman v. Colleton Cnty. Sch. Dist., 981 F.2d 152, 158 (4th Cir. 1992).

[21] *See, e.g.*, Melzer v. Bd. of Educ., 196 F. Supp. 2d 229, 245 (E.D.N.Y. 2002) (school had sufficient interest to terminate teacher for his association with a pedophilic organization, which was protected by the First Amendment, because disclosure of that association was "likely to impair [his] effectiveness as a teacher and cause internal disruption if he were returned to the classroom"); Cohen v. San Bernardino Valley College, 883 F. Supp. 1407, 1418 (C.D. Cal. 1995) (public college could restrict professor's speech where "substantial, uncontroverted evidence show[ed] that the educational process was disrupted by [his] focus on sexual topics and teaching style").

[22] *Cohen*, 883 F. Supp. at 1418.

[23] Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 957 (9th Cir. 2011).

[24] Calef v. Budden, 361 F. Supp. 2d 493, 499-500 (D.S.C. 2005).

[25] Scallet v. Rosenblum, 911 F.Supp. 999, 1009 (W. D. Va. 1996), *aff'd*, 106 F.3d 391 (4th Cir. 1997).

[26] *See, e.g.*, *Calef*, 361 F. Supp. 2d at 499-500; *Melzer*, 196 F. Supp. 2d at 251.

[27] *Cohen*, 883 F. Supp. at 1418.

[28] Wozniak v. Adesida, 932 F.3d 1008, 1010 (7th Cir. 2019).

universities' prohibition or punishing of educators' use of denigrating language in the classroom.[29] For the same reason, the Southern District of West Virginia recently held that a high school had the requisite interest to terminate a teacher whose Islamophobic remarks offended her Muslim students.[30]

By contrast, courts usually find educators to have the more substantial interest – and thus to be protected against sanction for or regulation of their speech – when their speech does not evidently impede the "proper performance of [their] daily duties in the classroom or . . . interfere[] with the regular operation of the [institution] generally."[31] Thus, in *Meriwether*, the Sixth Circuit held a university not to have a sufficient interest to prohibit a professor's misgendering of a transgender student in the ordinary course of his teaching, as the student continued to attend and participate in class and ultimately received a high grade.[32] A public school district similarly lacked an adequate interest to sanction a schoolteacher for her presentation on industrial hemp. Though controversial, the presentation had not been totally unrelated to the topic of the class nor unduly harmful to her relationship with students, so it was protected.[33] Another school was unable to prevent a teacher from wearing Black Lives Matter t-shirts merely because it offended a few parents, as it did not detract from his ability to "creat[e] a positive learning climate."[34]

Under the public-employee speech doctrine, the key factor determining whether a public school or university can regulate an educator's classroom speech[35] is thus the extent to which that speech threatens to degrade the educational environment.

B: *HAZELWOOD* AND THE SCHOOL-SPONSORED SPEECH DOCTRINE

A minority of five circuits have yet to adopt the public-employee speech doctrine as the governing standard in cases involving regulations of educators' in-class speech, instead relying on the standard for

[29] *See, e.g.*, Anderson v. Evans, 660 F.2d 153, 159 (6th Cir. 1981); Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 681 (6th Cir. 2001).
[30] Durstein v. Todd, 2022 U.S. Dist. LEXIS 156119, at *21 (S.D. W.Va. 2022).
[31] Meriwether v. Hartop, 992 F.3d 492, 511 (6th Cir. 2021) (quoting *Hardy*, 260 F.3d at 681).
[32] *Id.* at 510-11.
[33] Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1053-1055 (6th Cir. 2001).
[34] Fuller v. Warren Cnty. Educ. Serv. Ctr., 2022 U.S. Dist. LEXIS 25659, at *21 (S.D. Ohio 2022).
[35] This assumes, of course, that the speech is made as a citizen on a matter of public concern. *See infra* Parts I.A.1 and I.A.2.

restrictions of students' school-sponsored speech provided by *Hazelwood School District. v. Kuhlmeier*.[36] Under *Hazelwood* – unless a school has "'by policy or by practice' opened [its] facilities 'for indiscriminate use by the general public' . . . or by some segment of the public" – school facilities are not a public forum.[37] As such, student speech in a school forum (like a school newspaper) bears the imprimatur of the school, and school authorities can regulate that speech "so long as their actions are reasonably related to legitimate pedagogical concerns."[38]

Prior to the Supreme Court's decision in *Garcetti*, the First, Second, Seventh, Eighth, Tenth, and Eleventh Circuits extended the *Hazelwood* standard to cover educators' curricular speech, presuming such speech to bear the imprimatur of the school and upholding restrictions thereof only if an institution could show that they were motivated by legitimate pedagogical concerns.[39] "Whether a school official's action is reasonably related to a legitimate pedagogical concern 'will depend on, among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation.'"[40] But this standard is generally a lenient one for educational institutions, acknowledging that "the education of the Nation's youth," including the speech to which they are exposed, "is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."[41] Courts have accordingly held legitimate pedagogical concerns to include "limiting commercial solicitation during class time,"[42] "teach[ing] by example the shared values of a civilized order,"[43] "preventing [a teacher] from using his position of authority to confirm an

[36] 484 U.S. 260 (1988).
[37] *Id.* at 267 (quoting Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 47 (1983)).
[38] *Id.* at 273.
[39] *See* Mary L. Krebs, Note, *Can't Really Teach: CRT Bans Impose Upon Teachers' First Amendment Pedagogical Rights*, 75 VAND. L. REV. 1925, 1937 (2022); *see also* Cal. Teachers Ass'n v. Bd. of Educ., 271 F.3d 1141, 1149 n. 6 (9th Cir. 2001) (describing the pre-*Garcetti* circuit split).
[40] Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723-24 (2d Cir. 1994) (quoting Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993)).
[41] Bishop v. Aronov, 926 F.2d 1066, 1074 (11th Cir. 1991) (quoting *Hazelwood*, 484 U.S. at 272-73).
[42] Panse v. Eastwood, 303 F. App'x 933, 935 (2d Cir. 2008) (unpublished).
[43] Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718, 724 (8th Cir. 1998) (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986)).

unsubstantiated rumor,"[44] and "ensuring that teacher employees exhibit professionalism and sound judgment."[45]

Though the Seventh Circuit has since transitioned to using the *Pickering-Garcetti* framework for public-employee speech in cases involving educators' curricular speech,[46] *Hazelwood* is still the operative standard in the First, Second, Eighth, Tenth, and Eleventh Circuits.[47] The abandonment of *Hazelwood* as the standard for in-class speech may thus be a matter of time,[48] but for now it remains applicable to many contested regulations of educators' classroom speech. The Northern District of Florida, for example, recently invoked *Hazelwood* to strike down a state law prohibiting the teaching of Critical Race Theory in public colleges and universities.[49] Litigants defending Florida's anti-queer curriculum law against First Amendment challenges have also invoked *Hazelwood* as the appropriate standard.[50] As such, *Hazelwood* continues to command that schools regulate educators' in-class speech only pursuant to a legitimate pedagogical interest, *i.e.*, in order to provide an effective education to students.

C: ALTERNATIVES TO *PICKERING* AND *HAZELWOOD*

Though scholars have proposed alternatives to *Pickering* and *Hazelwood*, most proposals retain those standards' main emphasis: allowing educational institutions to regulate educators' classroom speech

[44] Miles v. Denver Public Sch., 944 F.2d 773, 778 (10th Cir. 1991)

[45] *Id.*

[46] *See* Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477, 479-480 (7th Cir. 2007); Piggee v. Carl Sandburg College, 464 F.3d 667, 669-674 (7th Cir. 2006).

[47] The First, Eighth, Tenth, and Eleventh Circuits have not yet addressed the appropriate standard for regulations of educators' classroom speech in the wake of *Garcetti*, so their pre-*Garcetti* cases applying *Hazelwood* remain good law. In its only case since *Garcetti* to concern the issue, the Second Circuit declined to decide whether the public-employee speech doctrine applies to educators' classroom speech or whether such speech is still covered by *Hazelwood*'s school-sponsored speech standard, finding the school regulation at issue to be permissible under either standard. *Panse*, 303 F. App'x at 934–35. District courts in the Second Circuit thus continue to use its pre-*Garcetti* standard based on *Hazelwood*. *See, e.g.*, Kirby v. Yonkers Sch. Dist., 767 F. Supp. 2d 452, 460 (S.D.N.Y. 2011).

[48] Outside the classroom, every circuit already applies the public-employee speech doctrine to educators' speech, denying First Amendment protection to such speech under *Garcetti*'s "official duties" test. *See, e.g.*, Alberti v. Carlo-Izquierdo, 548 Fed. Appx. 625, 638-639 (1st Cir. 2013) (unpublished); Weintraub v. Bd. of Educ., 593 F.3d 196, 201-203 (2d Cir. 2010); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1204 (10th Cir. 2007); Gilder-Lucas v. Elmore Cnty. Bd. of Educ., 186 F. App'x 885, 887 (11th Cir. 2006) (unpublished).

[49] Pernell v. Fla. Bd. of Governors of the State Univ. Sys., 2022 U.S. Dist. LEXIS 208374, at *28-30 (N.D. Fla. 2022).

[50] Brief of Texas et al. as Amici Curiae in Support of Defs. at 8-13, M.A. v. Fla. St. Bd. Educ., No. 4:22-cv-00134 (N.D. Fla. Feb. 15, 2023).

as needed to maintain healthy learning climates. Suggested alternatives include, for example, an amalgamation of the two doctrines that substitutes *Hazelwood*'s "legitimate pedagogical concern" as the relevant state interest in *Pickering*'s balancing test.[51] Other scholars propose standards less favorable to institutions that require a heavier burden to justify regulating educators' classroom speech.[52] Still others would impose a threshold requirement that educators receive notice of proscribed speech before regulations become eligible for a balancing analysis.[53] Though they tweak the details of *Pickering* and *Hazelwood*, these proposals do not diverge from the core value of providing schools and universities the necessary flexibility to educate effectively.[54] Even under the vast majority of alternative standards, then, the critical determinant of a public school or university's constitutional ability to regulate an educator's speech in the classroom will be whether the regulated speech threatens to disrupt the educational environment.

II: An Egalitarian Framework for Distinguishing among Classroom Speech Regulations

Under *Pickering*, *Hazelwood*, or proposed alternative standards that employ similar analyses, different regulations of educators' classroom speech on the same broad topics may appear constitutionally indistinguishable. So long as the state proffers a meaningful belief that an educator's speech will threaten

[51] *See, e.g.*, Tygesson, *supra* note 4, at 1945; Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, N.Y.U. L. Rev. 693, 702 (1990).

[52] *See, e.g.*, Joseph J. Martins, *Tipping the Pickering Balance: A Proposal for Heightened First Amendment Protection for the Teaching and Scholarship of Public University Professors*, 25 Cornell J. L. & Pub. Pol'y 649, 680 (2016) (offering a modified *Pickering* test for regulations of public university professors' curricular speech that weighs universities' and professors' competing interests "with a presumption in favor of the professor," which "[t]he university may rebut" only by "carry[ing] a heavy burden"); Kameron Dawson, *Teaching to the Test: Determining the Appropriate Test for First Amendment to "No Promo Homo" Education Policies*, 13 Tenn. J.L. & Pol'y 435, 455-456 (2019) (proposing a standard modelled on *Tinker*, under which regulations of curricular speech require "substantial evidence that supports the school districts' belief that the speech conflicts with the schools' mission and that it will cause a material disturbance in school activities"); JoNel Newman, *Will Teachers Shed Their First Amendment Rights at the Schoolhouse Gate? The Eleventh Circuit's Post-*Garcetti *Jurisprudence*, 63 U. Miami L. Rev. 761, 792 (2009) (proposing to protect teachers' in-class expression unless it substantially disrupts the educational process).

[53] *See, e.g.*, Kimberly Gee, *Establishing a Constitutional Standard that Protects Public School Teacher Classroom Expression*, 38 J.L. & Educ. 409, 412-13 (2009); Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. Rev. 959, 1022-29 (2003); Daly, *supra* note 5, at 7.

[54] There are, of course, more extreme proposals using categorical rules. But these give educational institutions total, not less, control over educators' speech. *See, e.g.*, Emily White Kirsch, Note, *First Amendment Protection of Teachers' Instructional Speech: Extending* Rust v. Sullivan *to Ensure that Teachers Do Not Distort the Government Message*, 58 Clev. St. L. Rev. 185, 206-215 (2010).

its pedagogical interest or disrupt the efficiency of the learning environment, the relevant standards seem not to care about the political or ideological valence of the regulation. Differentiating pronoun policies from anti-queer curriculum laws, both of which regulate educators' speech about gender and sexuality, thus becomes difficult as a constitutional matter. But advocates hoping to challenge one without imperiling the other may gain purchase for a distinction using an "egalitarian" grammar of free speech argumentation. Such a grammar looks beyond the interests of an individual plaintiff challenging regulation of her speech to the government's interest in protecting the First Amendment rights of third parties whose expression may be compromised by the plaintiff and in fostering a healthy expressive environment overall. This Part first describes the egalitarian framework in the abstract before explaining its potential utility and doctrinal viability in the context of the public classroom. Part III will discuss the framework's particular application to pronoun policies and anti-queer curriculum laws.

A: The Egalitarian Argument for Considering Third-Party Speech Interests

In recent years, progressive legal thinkers have lamented the Supreme Court's embrace of an "aggressive, libertarian" view of the First Amendment "to protect the privileges of the economically powerful and to resist legislative and executive efforts to advance the interests of the economically marginal."[55] This jurisprudential trend, commonly labeled "First Amendment Lochnerism"[56] in an analogy to *Lochner v. New York*,[57] serves not only to entrench economic disparities but more generally "to crowd out egalitarian norms across the social field, propagating inequalities" of all sorts.[58] Finding contemporary First Amendment doctrines and the abstract values underlying them to be inadequate to combat this Lochnerism, progressive scholars like Professors Jeremy Kessler and David Pozen have sought to recover an older, "egalitarian" grammar of arguments in order to push back against the inegalitarian trend.[59]

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[55] Jeremy Kessler & David Pozen, *The Search for an Egalitarian First Amendment*, 118 Colum. L. Rev. 1953, 1962-63 (2018).

[56] *See, e.g., id.* at 1962-64; Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. Chi. L. Rev. Online 1241, 1244-45 (2020); Sorrell v. IMS Health, Inc., 564 U.S. 552, 591-92 (Breyer, J., dissenting) (analogizing the Court's decision to *Lochner*).

[57] 198 U.S. 45 (1905).

[58] Kessler & Pozen, *supra* note 55, at 1963.

[59] *Id.* at 1994-2006.

One genre of argumentation using this grammar considers "speech on both sides," examining whether government restriction of one party's speech is justified due to the threat posed by that speech to the expressive interests of third parties.[60] Such arguments rely on those third-party speech interests either (1) diminishing the regulated party's interest in speech or (2) bolstering the state's interest in regulating the party's speech.[61] Professor Michal Lavi, for example, has used such reasoning to assert that the First Amendment may permit government censorship of terrorist speech, online hate speech and shaming, and disinformation on social media because such speech chills the online expression of third parties.[62] Professors Kessler and Pozen posit that the "speech on both sides approach" serves "to promote the positive liberty of those disempowered speakers who find it difficult to vindicate their expressive interests as First Amendment plaintiffs."[63]

A second genre of argumentation using this egalitarian grammar takes a macro-level approach to advocate in favor of regulations that "best serve the expressive environment as a whole."[64] Professor Kate Andrias has used this reasoning to support the constitutionality of laws requiring non-union employees to pay agency fees.[65] Such regulation of non-union employees' speech is permissible, the argument goes, because it is critical to the democratic speech environment in elevating union voices as political counterweights to the voices of business interests.[66] This type of systemic argument attends to the widest possible array of interests, accounting for "the perspective of listeners as well as speakers" and "taking into account the informational and expressive interests of as many listeners and speakers as practicable."[67]

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[60] Kessler & Pozen, *supra* note 55, at 1994.
[61] *Id.* at 1995.
[62] *See* Michal Lavi, *Do Platforms Kill?*, 43 HARV. J.L. & PUB. POL'Y 477, 529-530 (2020); Michal Lavi, *The Good, the Bad, and the Ugly Behavior*, 40 CARDOZO L. REV. 2597, 2644 (2019); Michal Lavi, *Publish, Share, Re-Tweet, and Repeat*, 54 U. MICH. J.L. REFORM 441, 469-470 (2021).
[63] Kessler & Pozen, *supra* note 55, at 1995.
[64] *Id.* at 2001.
[65] Kate Andrias, *Janus's Two Faces*, 2018 SUP. CT. REV. 21, 56-57 (2018).
[66] *Id.*
[67] Kessler & Pozen, *supra* note 55, at 2001.

B: THE EGALITARIAN FRAMEWORK IN THE PUBLIC CLASSROOM

In recent decades, most lines of free-speech jurisprudence have foreclosed the consideration of third-party interests necessary to arguments about "speech on both sides" and the broader expressive environment.[68] Because the standards governing public educators' speech permit courts to account for the expressive interests of students, however, these kinds of egalitarian arguments continue to have doctrinal salience in the context of the classroom. *Pickering* authorizes regulation of educators' curricular speech where the government has a sufficient interest in preserving the efficiency of its educational services.[69] *Hazelwood* similarly allows such regulation if reasonably related to the government's legitimate pedagogical interests.[70] Those government interests naturally include protecting the expression of students from the chilling effects of educators' speech and preserving a healthy expressive environment across the whole institution. Under either standard, then, egalitarian arguments are feasible.

Some courts have already begun factoring students' interests and systemic concerns about the institutional environment into their analyses of regulations of educators' speech. In *Meriwether v. Hartop*, for example, the Sixth Circuit evaluated a public university's pronoun policy using the *Pickering* framework. In doing so, the court included as a factor in its balancing analysis the interests of students "in receiving informed opinion," though it erroneously concluded that students' interests weighed in favor of the professor challenging the policy.[71] And at least one court of appeal has held that concerns about the broader classroom environment constituted a "legitimate pedagogical concern" under *Hazelwood.* In *Miles v. Denver Public Schools*, the Tenth Circuit held that a school's "legitimate pedagogical interest" in "providing an educational atmosphere where teachers do not make statements about students that embarrass those students among their peers" was adequate to sanction a teacher for spreading an unsubstantiated rumor that two students had been observed having sexual intercourse on school grounds.[72] Several additional

[68] *See* Kessler & Pozen, *supra* note 55, at 2006.
[69] *See infra* Part I.A.3.
[70] *See infra* Part I.B.
[71] 992 F.3d 492, 510 (6th Cir. 2021).
[72] 944 F.2d 773, 778 (10th Cir. 1991).

courts have tacitly considered students' interests as listeners in permitting government institutions to restrict educators from speaking in ways that impaired their relationship with students or that degraded students' learning experience.[73]

Several legal scholars have advocated for the consideration of the interests of students, albeit as listeners rather than as speakers, in evaluating the permissibility of restrictions on educators' curricular speech. Professors Inara Scott, Elizabeth Brown, and Eric Yordy posit that the state's interest in regulating educators' classroom speech is in providing an effective education to students.[74] Rather than balancing only the interests of the state and the educator-speaker, then, courts should give explicit weight to "the interests of students . . . in learning in a nondiscriminatory and inclusive environment."[75] Michael Sloman argues that considering these third-party interests better comports with the purpose of public education and teaching, which is not merely for educators "to express their own ideas" but rather to "engage in a dialogue with their students."[76] Accounting for students' interests as listeners also protects their First Amendment right to "receive information and ideas."[77] Taking a cognitive theory approach, Rosina Mummolo highlights the importance of accounting for the interests of K-12 students in evaluating regulations of schoolteachers' speech, as children are a "captive audience" in this context who "learn new skills, alter their behavior," and adopt "moral values" based on the adult models they observe in the classroom.[78] And

[73] *See, e.g.*, Wozniak v. Adesida, 932 F.3d 1008, 1010 (7th Cir. 2019) (state university permitted to terminate professor who "harass[ed] and humiliate[d] students," as he could not "successfully teach them" and left them so "shell-shocked" that they had "difficult[y] learning in other professors' classes"); Piggee v. Carl Sandburg College, 464 F.3d 667, 672 (7th Cir. 2006) (public college had sufficient interest to regulate instructor's religious proselytizing, which "undermin[ed] her relationship with . . . students who disagreed with or were offended by her expressions of her beliefs"); Martin v. Parrish, 805 F.2d 583, 585-86 (5th Cir. 1986) (public college permitted to terminate instructor whose belittling comments caused students to "los[e] interest in economics" and "express [] reticence to asking questions in class"); Calef v. Budden, 361 F. Supp. 2d 493, 499-500 (D.S.C. 2005) (middle school had sufficient interest to ban substitute teacher who "foist[ed] her [political] views on an impressionable, captive audience" of students); Cohen v. San Bernardino Valley College, 883 F. Supp. 1407, 1418 (C.D. Cal. 1995) (public college had sufficient interest to regulate instructor's sexually suggestive remarks and use of vulgarities because they "prevented [students] from learning").

[74] Scott et al., *supra* note 11, at 982.

[75] *Id.* at 981.

[76] Sloman, *supra* note 11, at 951.

[77] *Id.* (citing Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972)).

[78] Rosina E. Mummolo, Note, *The First Amendment in the Public School Classroom: A Cognitive Theory Approach*, 100 CORNELL L. REV. 243, 253-258 (2014).

Gabrielle Dohmen proposes that university students' right to access the contents of a lecture should swing the pendulum in favor of a public university seeking to regulate professorial speech inhibiting that right.[79]

This approach also comports with longstanding Supreme Court jurisprudence concerning the purpose of public education. The Court has long recognized that the "classroom is peculiarly the 'marketplace of ideas,'" and that the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a *multitude of tongues*[.]'"[80] As such, the Court in *Keyishian v. Board of Regents* held that the First Amendment "does not tolerate laws" that have the effect of chilling that exchange of ideas by casting a "pall of orthodoxy over the classroom."[81] Put another way, pollution of the classroom speech environment is anathema to the First Amendment.

In *Grutter v. Bollinger*, the Court reaffirmed the importance of maintaining public classrooms as fora in which diverse viewpoints can be expressed, for "'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'"[82] *Grutter* thus held that states have a compelling interest in ensuring a diversity of backgrounds among students in public university classrooms, achievement of which in the immediate case required a limited use of race-conscious admissions practices.[83] The same interest could require preventing teachers from speaking in a manner that chills the speech of some students in the classroom, as doing so would limit the diversity of viewpoints shared.[84]

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[79] Dohmen, *supra* note 11, at 1593-94.

[80] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting *United States v. Assoc. Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943)) (emphasis added).

[81] *Keyishian*, 385 U.S. at 603.

[82] 539 U.S. 306, 330 (2003) (citation omitted).

[83] *Id.* at 329. The Court recently heard challenges to *Grutter*'s holding that universities' interests in diverse student bodies are sufficiently compelling to satisfy strict scrutiny and thereby to permit race-conscious admissions practices. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 20-1199 (U.S., argued Oct. 31, 2022); Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S., argued Oct. 31, 2022). But the result of those challenges should not change this Note's analysis. Whether or not today's Court finds the diversity interest compelling, it is certainly sufficient to outweigh an individual educators' speech interests and to constitute a legitimate pedagogical concern for the purposes of *Pickering* and *Hazelwood*.

[84] While *Grutter* does not extend directly to the K-12 school context, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725 (2007), Justice Kennedy's controlling concurrence in *Parents Involved* indicated that public K-12 schools also have a compelling interest in a broadly diverse student body. *Id.* at 788 (Kennedy, J., concurring in part and concurring in the judgement).

The existing public-employee speech and school-sponsored speech doctrines, current practice among many federal courts, and the core values underlying the Supreme Court's education-related jurisprudence thus indicate that the government's interest in regulating educators' speech in public classrooms includes protecting students' expression and the health of the classroom as an expressive environment. Where educators' speech has the effect of chilling students' expression or deteriorating the classroom expressive environment, courts should consequently find the government interest in restricting that speech to overcome the educator's own speech interests.

Applicant Details

First Name	**Laura**
Last Name	**Lowry**
Citizenship Status	**U. S. Citizen**
Email Address	**lel3u@virginia.edu**
Address	**Address** Street **2401 Arlington Blvd., Apt. 53** City **Charlottesville** State/Territory **Virginia** Zip **22903**
Contact Phone Number	**8603059757**

Applicant Education

BA/BS From	**Middlebury College**
Date of BA/BS	**May 2014**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 21, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Global Antitrust Invitational**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Goluboff, Risa
goluboff@law.virginia.edu
(434) 924-7343
Barzun, Charles
cbarzun@law.virginia.edu
(434) 924-6454

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Laura Lowry
401 Granby St., Apt. 407
Norfolk, Virginia 23510
Lel3u@virginia.edu | (860) 305-9757

June 7, 2023

The Honorable Beth Robinson
United States Court of Appeals, Second Circuit
11 Elmwood Ave.
Burlington, Vermont 05401

Dear Judge Robinson,

I am a 2023 graduate of the University of Virginia School of Law and a current law clerk to the Honorable Jamar K. Walker. I am writing to apply for a clerkship in your chambers for the 2024-2025 term.

I lived in Vermont while attending Middlebury College and my brother, sister-in-law, and niece live in South Burlington. After having spent so much time away, I am excited about the opportunity to spend a year close to family clerking in a state I love.

I am enclosing my resume, law school and undergraduate transcripts, and writing sample. You will also be receiving letters of recommendation from Dean Risa Goluboff and Professor Charles Barzun. Both have said that they would be happy to speak with you directly. If you would like to reach them, Dean Goluboff's telephone number is (434) 924-7343 and Professor Barzun's telephone number is (434) 924-6454.

Please let me know if I can provide any further information. I appreciate your consideration.

Sincerely,

Laura Lowry

Laura E. Lowry

401 Granby St.., Apt. 407, Norfolk, VA 23510 • (860) 305-9757 • lel3u@virginia.edu

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., GPA: 3.94, May 2023

- Thomas Marshall Miller Prize (awarded to an outstanding and deserving member of the graduating class by faculty vote)
- *Virginia Law Review*, Notes Development Editor
- Supreme Court Litigation Clinic (Fall 2022 – Spring 2023)
- Legal Writing Fellow (Fall 2022 – Spring 2023)
- Norton Rose Fulbright Best Memorandum Award (best memorandum in section)
- Extramural Moot Court Team, Coach

Middlebury College, Middlebury, VT
B.A., Political Science and History, *cum laude,* May 2014

- Honors Thesis: *Lifting the Veil on French National Identity: Examining the Impact of Algerian Independence on 'Frenchness', 1952-1980*
- Varsity Women's Basketball

EXPERIENCE

United States District Court for the Eastern District of Virginia, Norfolk, VA
Law Clerk to the Honorable Jamar K. Walker, May 2023 – present

Covington & Burling LLP, Washington, DC
Summer Associate, May 2022 – July 2022

University of Virginia School of Law, Charlottesville, VA
Research Assistant to Professor Saikrishna Prakash, January 2022 – May 2022

- Conducted a literature review on the meaning of the "spirit of the law"

Research Assistant to Professor A.E. Dick Howard, May – August 2021

- Researched voting laws in 1960s Virginia to draft an article detailing how the state implemented both the Voting Rights Act and "One Person One Vote"

United States District Court for the District of Columbia, Washington, DC
Judicial Intern to the Honorable Tanya S. Chutkan, June – July 2021

- Conducted legal research and drafting memoranda concerning civil and criminal matters pending before the Court
- Attended hearings in civil and criminal matters

Democratic Legislative Campaign Committee, Washington, DC
Executive Aide to the President, September 2019 – August 2020

ActBlue, Boston, MA
Partnerships Manager, July 2017 – September 2019

Pennsylvania Democratic Party, Harrisburg, PA
Organizer, August – November 2016

Seyfarth Shaw LLP, Boston, MA
Business Immigration Analyst, June 2015 – June 2017

Phillips Andover Academy, Andover, MA
Teaching Fellow, August 2014 – May 2015

INTERESTS

Certified personal trainer, group fitness, baking

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Laura Lowry

Date: June 06, 2023
Record ID: lel3u

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2020			
LAW	6000	Civil Procedure	4	A-	Woolhandler,Nettie A
LAW	6002	Contracts	4	A+	Johnston,Jason S
LAW	6003	Criminal Law	3	A-	Coughlin,Anne M
LAW	6004	Legal Research and Writing I	1	S	Ware,Sarah Stewart
LAW	6007	Torts	4	A	Cope,Kevin
		SPRING 2021			
LAW	6001	Constitutional Law	4	A	Barzun,Charles Lowell
LAW	7009	Criminal Procedure Survey	4	A	Bowers,Josh
LAW	6107	International Law	3	A	Verdier,Pierre-Hugues
LAW	6005	Lgl Research & Writing II (YR)	2	S	Ware,Sarah Stewart
LAW	6006	Property	4	A	Johnson,Alex M
		FALL 2021			
LAW	8003	Civil Rights Litigation	3	A-	Jeffries Jr.,John C
LAW	8004	Con Law II: Speech and Press	3	A	Schauer,Frederick
LAW	6104	Evidence	4	A	Brown,Darryl Keith
LAW	7106	Law of the Police I	3	A	Harmon,Rachel A
LAW	7649	State Constitutions (SC)	1	A-	Howard,A. E. Dick
		SPRING 2022			
LAW	6102	Administrative Law	4	A	Bamzai,Aditya
LAW	9240	Con Law II: Poverty	3	A	Goluboff,Risa L
LAW	8810	Directed Research	1	CR	Prakash,Saikrishna B
LAW	8814	Independent Research (YR)	0	YR	Bowers,Josh
LAW	7090	Regulatn of Political Process	3	A-	Gilbert,Michael
		FALL 2022			
LAW	8815	Independent Research (YR)	2	A+	Bowers,Josh
LAW	8800	Legal Writing Fellow (YR)	2	CR	Ware,Sarah Stewart
LAW	7067	National Security Law	3	A	Deeks,Ashley
LAW	7071	Professional Responsibility	3	A-	Mitchell,Paul Gregory
LAW	9089	Seminar in Ethical Values (YR)	0	YR	Barzun,Charles Lowell
LAW	8624	Supreme Crt Litigatn Clin (YR)	4	CR	Ortiz,Daniel
		SPRING 2023			
LAW	7637	Trial Advocacy College (SC)	2	CR	Saltzburg,Stephen A
		SPRING 2023			
LAW	6105	Federal Courts	4	A	Collins,Michael G
LAW	8801	Legal Writing Fellow (YR)	1	CR	Ware,Sarah Stewart
LAW	7062	Legislation	4	A-	Nelson,Caleb E
LAW	9090	Seminar in Ethical Values (YR)	1	CR	Barzun,Charles Lowell
LAW	8625	Supreme Crt Litigatn Clin (YR)	4	A	Ortiz,Daniel

June 6, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing on behalf of Laura Lowry, who is applying for a clerkship in your chambers.

I taught Laura in my Constitutional Law II: Poverty class in the spring of 2022. From the first time she spoke in class, her intelligence, seriousness of purpose, and maturity made me want to hear more from her. Throughout the course, Laura's interventions in class discussion were judicious and respectful, sophisticated and analytically sharp, completely her own and open to revision. I was not at all surprised that her final paper in the class moved seamlessly between the doctrinal and the theoretical, simultaneously grounded in the cases we read and creative in its own argumentation. Laura received one of only four grades of A I gave in the class, and the only one that went to a second-year (as opposed to a third-year) student.

When Laura asked me to write this letter of recommendation, I was not at all surprised that her performance in her other classes has been equally stellar: Her 3.947 GPA ranks her seventh in her class of 266.

Laura has maintained a stellar academic record throughout college and law school while simultaneously engaging in many other impressive (and highly time-consuming) activities. Laura double-majored in political science and history at Middlebury College, graduating cum laude in 2014. In addition to balancing a heavy course load and writing an honors thesis, Laura also found time to play point guard (and serve as captain) on Middlebury's varsity basketball team for four years. She brought her considerable intellect and time management skills to her professional work prior to law school, serving as a high school history teacher for one year, as a business immigration analyst for two years, and as a Democratic organizer for three years.

Here at UVA Law, Laura has served as both a Notes Development Editor for the Virginia Law Review and a Legal Writing Fellow, guiding a cohort of approximately 15 first-year students through their legal research and writing class by providing regular feedback on their work. The Legal Writing Fellow selection process is quite competitive here at Virginia and fellows carry a heavy workload. Students who are invited to join the Law Review and to work as a Legal Writing Fellow typically turn down the latter opportunity because it is seen as just too difficult to do both at once. Laura's unusual choice to pursue both opportunities in her 2L year speaks to her industrious nature, her intellectual ambition, her ability to juggle a busy schedule, and her desire to serve her peers.

Laura's other law school pursuits reflect her interest in litigation, and her particular focus on the research and writing skills critical to work as both a law clerk and a litigator. She coaches our extramural moot court team. She has served as a research assistant for three of our faculty members and joined the highly selective, application-only Supreme Court Litigation Clinic in the fall of her 3L year. She has likewise spent her summers productively, interning for the Honorable Tanya S. Chutkan of the United States District Court for the District of Columbia and working as a summer associate at Covington & Burling. In the 2023-24 court term, Laura will also acquire valuable experience as a law clerk for the Honorable Jamar K. Walker of the United States District Court for the Eastern District of Virginia.

On top of her excellent credentials, impressive legal and work experiences, and clear legal smarts, Laura is a terrific person. She comes from a large family with varied politics and levels of educational attainment. That has taught her not only how experiences shape perspectives, but also the importance of being critical of one's own beliefs and listening to opposing viewpoints. Teacher, moot court coach, point guard and basketball captain, Notes Development Editor—in each of these roles, Laura has shown herself to be a true servant-leader. She is a team player who both offers her own contributions to every team of which she is a part and works hard to enable everyone else to do so as well. I have really enjoyed getting to know Laura, and I am confident that you will too.

I am delighted to recommend Laura Lowry to you. She will make an excellent clerk and a welcome addition to any chambers. Please let me know if I can be of additional assistance.

Thank you,

Risa Goluboff
Dean, University of Virginia School of Law
Arnold H. Leon Professor of Law
Professor of History

Risa Goluboff - goluboff@law.virginia.edu - (434) 924-7343

June 05, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write to recommend highly Laura Lowry for a clerkship in your chambers. Laura is an extremely bright young woman, who I think would make a terrific clerk in any chambers.

I got to know Laura the spring of her first year when her section was assigned to me for Constitutional Law. I teach Constitutional Law in a fairly traditional way, using a combination of Socratic method, lecture, and voluntary class discussion—though deploying any of those methods that year was made more difficult by the fact that the class was large (75 students) and conducted in a "hybrid" format, with some students on Zoom and the rest in person but masked-and-socially-distanced in an enormous auditorium. Even under those strange conditions, Laura was a star. She did not speak frequently, but when she did, she invariably knew exactly what I was getting at. She would also frequently come to office hours (on zoom), where she demonstrated through the questions she asked that she was thinking about the issues in the class at a level of sophistication unmatched by most of her classmates. I was thus not particularly surprised that hers was the 4th best exam in the entire class, earning her an A for the semester.

Laura's impressive performance in my class is hardly anomalous. At the midpoint of her law-school career, she has a GPA of 3.94, ranking her No. 7 overall in her class. More impressive still, Laura has put together that record while throwing herself into the intellectual and extracurricular life of the law school. She works as a Legal Writing Fellow, competed on the Extramural Moot Court Team, won the Best Memo award for her first-year section, and, finally, serves as Notes Development Editor on the prestigious Virginia Law Review.

I am not sure what Laura plans to do after clerking, but I'm confident that whether she works in private practice or public service or something else entirely, she will make a fantastic lawyer, because she is sharp as a tack and radiates confidence and composure. For the same reasons, I think she will make a fantastic judicial clerk. Still, if you have any questions about Laura, or would like to discuss her candidacy any further, please do not hesitate to email (cbarzun@virginia.edu) or call me at any time (434-924-6454), and I will call you back at your convenience.

Sincerely,

Charles L. Barzun

Laura E. Lowry

401 Granby St., Apt. 407, Norfolk, VA 23510
(860) 305-9757 | lel3u@virginia.edu

Writing Sample

The attached writing sample is a research memo that I wrote during my work for the Supreme Court Litigation Clinic at the University of Virginia. The main goal of the assignment was to evaluate opposing counsel's argument that certain cases stand for the proposition that only Supreme Court decisions qualify as an "intervening change of law." It has been redacted to remove any identifying information. It is entirely self-written and self-edited. Additionally, this is a version of the memo that was completed prior to discussing the question with the clinic.

MEMORANDUM

To: [redacted]
From: Laura Lowry
Date: Sept. 5, 2022
Re: Whether circuit court decisions qualify as an "intervening change in the substantive law"

I. Summary

The purpose of this memo is to evaluate the [redacted] argument that *Sunal v. Large*, 332 U.S. 174 (1947), and *Davis v. United States*, 417 U.S. 333 (1974), stand for the proposition that only Supreme Court decisions qualify as an "intervening change in substantive law." The answer to this question is not as clear as the [redacted] brief would lead us to believe. First, the Supreme Court's holding and reasoning in *Davis* stands for the opposite conclusion – that circuit court opinions constitute an "intervening change in law." It was the Ninth Circuit's decision in *United States v. Fox* that propelled the Supreme Court's decision that the petitioner could bring a § 2255 proceeding. Therefore, the Supreme Court itself viewed the change in law as coming from a circuit court opinion. In short, [redacted] is asking the Court to overrule *Davis*, not apply it.

Further, the [redacted] argument relies on the distinction that Supreme Court drew between *Davis* and *Sunal*. However, the citations in the [redacted] brief are misleading. While the Supreme Court does distinguish *Davis* and *Sunal*, it does so largely on the grounds that *Sunal* is an example of a general rule and does not stand for the broad proposition that non-constitutional claims can never be asserted. At no point in the opinion does the Supreme Court cite to the language from *Sunal* that [redacted] is relying upon.

Second, the language from *Sunal* that the [redacted] relies on is not the holding from the case. The focus of the Supreme Court's discussion in *Sunal* is whether habeas relief is available for an issue that the party could have argued on direct appeal but chose not to. The discussion that the [redacted] relies on is in the section of the opinion discussing whether the petitioner had sufficient cause for their failure to raise the issue. It is not clear from the Supreme Court's reasoning what is doing the work – the fact that there was no Supreme Court decision or the specific facts of the case, namely that it appears the attorneys strategically chose which cases to appeal to get a favorable result.

Third, *Sunal* has not come to stand for the proposition that only Supreme Court decisions qualify as an "intervening change in the substantive law." Most subsequent cases that cite or discuss *Sunal* do so for its holding that habeas cannot service as an appeal and very few reference the language the [redacted] relies on. In *United States v. Sobell*, 314 F.2d 214 (2d Cir. 1963), the Second Circuit discusses that portion of the case and analogizes to the facts of *Sunal*. The Second Circuit reasoned that, like *Sunal,* this was a case that involved a question of law that had not "changed after the time of appeal expired. It is rather a situation where at the time of the convictions the definitive ruling on the law had not crystallized." *Sobell* suggests

some lower court support for the [redacted] argument. However, in a later opinion the Second Circuit limits *Sunal* to its facts and specifically highlights that the Supreme Court relied heavily on the decision not to appeal the conviction. *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974).

This memo will first discuss the facts of *Sunal* as well as the Supreme Court's holding and reasoning in the case. Next, it will discuss how subsequent Supreme Court and lower court cases have applied *Sunal*. Then, the memo will discuss the facts and holding of *Davis*. Finally, it will assess the [redacted] argument that these cases stand for the proposition that only intervening Supreme Court decisions qualify as an "intervening change in the substantive law."

II. Discussion

A. Sunal v. Large

The petitioners (Sunal and Kulick) registered under the Selective Training and Service Act of 1940. [1] They claimed that their status as a Jehovah's Witness granted them an exemption, but it was denied. Each defendant was ordered to report for induction, and both refused. As a result, they were indicted, tried, and convicted for refusing to submit to induction in 1945. At trial, the petitioners offered evidence to show that their selection service classification was invalid. However, the trial court held that this evidence was inadmissible, and that the classification was not open to attack in a criminal trial. On Feb. 4, 1946, the Supreme Court held, on similar facts, that a registrant who had exhausted their administrative remedies was entitled to argue that the local board exceeded its jurisdiction in making its selective service classification. *Estep v. United States*, 327 U.S. 114, 122-23 (1946); *Smith v. United States*, 327 U.S. 114, 122-23 (1946). Shortly after *Estep* and *Smith* decisions were released, the defendants filed habeas petitions. In Sunal's case, the Fourth Circuit held that the classification had a basis in fact and affirmed the judgment to deny the petition. In Kulick's case, the Second Circuit reversed a lower court's decision and ruled that because Kulick was denied this defense he should be discharged from custody.

The Court focused its discussion on two issues: (1) the general rule that habeas is not allowed to serve as a direct appeal of a conviction and (2) whether this case falls within any of the exceptions to that general rule. *Sunal*, 332 U.S. at 178. The Court began by noting the general rule that habeas is not designed for collateral review of errors of law that do not cross the jurisdictional line. *Id.* at 179. However, this rule is not absolute and there are times when habeas can do the service of an appeal based on "exceptional circumstances." *Id.* at 180.

The Court then discussed whether the facts of this case present exceptional circumstances such that habeas is available although the petitioners never directly appealed their convictions. Specifically, the Court focused on whether the failure to appeal was excusable because when the decisions were made –March and May 1945–the lower courts had consistently ruled that attacking the selective service classification was not an available defense. *Id.* at 174. Further, the Supreme Court had denied cert to a case raising the same question at issue. *Id.* The petitioners

[1] The summary of the facts comes from *Sunal v. Large, Superintendent, Federal Prison Camp*, 332 U.S. 174, 174–76 (1947).

argued that the state of the law made the appeals seem "futile," and therefore, the decision not to appeal was excusable. *Id.* at 181. The Court rejected that argument. *Id.* At the time the defendants in *Sunal* were convicted, *Estep* and *Smith* were pending before the appellate courts and further, the same counsel represented the defendants in all three cases. *Id.* The Court stressed that "the same road was open to Sunal and Kunick as the one Smith and Estep took" and therefore, "the case…is not one where the law was changed after the time for appeal had expired…it is rather a situation where at the time of the convictions the definitive ruling on the question of law had not crystallized." *Id.* Therefore, the petitioners chose not to pursue a remedy which was available to them (and used in other cases that the same counsel filed) and the Court did not "think they should now be allowed to justify their failure by saying they deemed any appeal futile." *Id.*

B. Subsequent Application of Sunal*'s Holding*

Courts have frequently referred to the *Sunal* rule that a collateral attack will not "do service for an appeal" and very few explicitly address the language that [redacted] relies on. Below is a non-exhaustive list of cases that discuss *Sunal*:

- ***Reed v. Farley*, 512 U.S. 339 (1994)** – used to support the general rule that "so far as conviction obtained in the federal courts are concerned, the general rule is that the writ of *habeas corpus* will not be allowed to service for an appeal."
- ***Davis v. United States*, 417 U.S. 333 (1974)** – the Supreme Court distinguished *Sunal* on the grounds that the claims raised were purely statutory. *Sunal* is cited in the Court's discussion of the lack of precedent on whether a claim based on the "laws of the United States rather than the Constitution" is cognizable under § 2255. The Court does not read *Sunal* to stand for the broad proposition that a party can never assert non-constitutional claims in collateral attacks upon criminal convictions. The implication is that absent the dispositive facts in *Sunal* – presumably the petitioners' decision not to appeal the conviction – a challenge not grounded in the Constitution would not preclude its assertion in a § 2255 proceeding.
- ***United States v. Sobell*, 314 F.2d. 314, 324 (2d Cir. 1963)** – *Sunal* is used to discuss whether an error can be raised in habeas even though it was not raised on appeal. The Second Circuit analogizes the facts of the case to *Sunal* where both defendants had faced a consistent line of lower court decisions adverse to their position including a case in which the Supreme Court had denied cert. The Second Circuit's reasoning indicates some support for the idea that only a Supreme Court decision constitutes a change in substantive law. Specifically, it cites the language from *Sunal* that "the case, therefore, is not one where the law was changed after the time for appeal had expired. It is rather a situation where at the time of the convictions the definitive ruling on the question of law had not crystallized." *Id.* at 324. Additionally, the Second Circuit reasoned that "there is an inevitable attraction that a person convicted of a serious crime should receive a new trial whenever a *later decision of the highest court* indicates that, with the benefit of hindsight a different course should have been followed in his trial in any consequential respect." *Id.* (emphasis added).
- ***United States v. Travers,* 514 F.2d 1171 (2d Cir. 1974)** – the Second Circuit held that only defendants who exhausted their opportunity to directly appeal their convictions can bring a § 2255 petition after an intervening Supreme Court decision that changes the law.

  - First, the Second Circuit emphasized that the Supreme Court's decision in *Sunal* rested heavily on the failure of the petitioners to appeal the case. Thus, *Sunal* cannot be understood as standing for a broad proposition that non-constitutional claims can never be collaterally attacked. Rather, the implication is that absent a failure to appeal the fact that the claim is not grounded in the Constitution does not preclude its assertion in a § 2255 proceeding.
  - Second, the Second Circuit discusses the "futility" argument. The Second Circuit highlights that the principle applied here could arguably be applied to all defendants convicted after the denial of cert and prior to Supreme Court's decision because the appeal would have been futile. However, the Second Circuit reasons that the Supreme Court explicitly rejected this argument in *Sunal* and as a result, limits its holding only to those defendants who had exhausted their direct appeals.
- ***Natarelli v. United States*, 516 F.2d. 149 (2d Cir. 1975)** – the Second Circuit relied on *Sunal* to preclude the defendant from making a collateral attack on his sentence because of his failure to raise the point on direct appeal.
- ***United States v. Walker*, 2017 WL 3438763 (E.D. Cal. 2017)** – cited to support the proposition that claims, which could have been but were not raised on appeal are not cognizable under § 2255 motions.
- ***United States v. Greer*, 2017 WL 3438762 (E.D. Cal. 2017)** – cited to support the proposition that claims, which could have been but were not raised on appeal are not cognizable under § 2255 motions.
- ***United States v. National Dairy Products Corp.*, 313 F. Supp. 534 (W.D. Mo. 1970)** – the Western District of Missouri largely discussed *Sunal* in the section of the opinion dealing with what claims must be raised on direct appeal. The Court noted that qualifying language from the opinion that the rule is "not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent."
- ***Kaufman v. United States*, 394 U.S. 217 (1969)** – the Supreme Court cites to *Sunal* to support the proposition that *habeas* is not designed for collateral review of errors of law, but that rule does not limit relief for constitutional claims.

C. Davis v. United States

Davis concerned a somewhat complicated procedural posture. Davis was convicted for failure to report for induction into the draft. *Davis*, 417 U.S. at 337. During Davis's direct appeal of his criminal conviction to the Ninth Circuit, the Supreme Court decided *Gutknecht v. United States*, 396 U.S. 295 (1970), which concerned a related issue. *Id*. at 338. Davis's case was remanded to the district court for reconsideration considering *Gutknecht*, but the district court and the Ninth Circuit ultimately found that *Gutknecht* did not apply. *Id*. at 338-39. Later, in a "virtually identical" case, *United States v. Fox*, 454 F.2d 593 (9th Cir. 1971), the Ninth Circuit determined that *Gutknecht* in fact did apply. *Id*. at 340. Davis then filed a § 2255 motion, arguing that the Ninth Circuit "had in the Fox case effected a change in the law of that Circuit after the affirmance of his conviction, and that its holding in Fox required his conviction to be set aside." *Id.* at 341. The district court denied the motion and the Ninth Circuit affirmed "on the ground that '(t)he decision on the direct appeal is the law of the case,' and that therefore any 'new law,

or change in law' resulting from…Fox would 'not (be) applied.'" *Id.* The Supreme Court granted certiorari "[b]ecause the case present[ed] a seemingly important question concerning the extent to which relief under 28 U.S.C. § 2255 is available by reason of an intervening change in the law." Ibid.

The Court characterized the "sole issue" as "the propriety of the Court of Appeals' judgment that a *change in the law of that Circuit* after the petitioner's conviction may not be successfully asserted by him in a § 2255 proceeding." *Id*. at 341 (emphasis added). The Court interpreted the law in *Gutknecht*, but the Ninth Circuit interpreted *Gutknecht* differently in *Fox* than in *Davis*. The Court held that the situation was a "complete miscarriage of justice" and justified collateral relief under § 2255. *Id*. at 346.

D. Evaluating the [redacted] Argument

The [redacted] argument rests on the idea that *Sunal* and *Davis* stand for the proposition that only Supreme Court decisions constitute an "intervening change in law." But there are four flaws with that argument: (1) Davis, which is directly on point, supports the opposition position; (2) it is not clear whether the holding from *Sunal* is that absent a decision from the Supreme Court there is no definitive ruling on the law; (3) subsequent courts have not understood *Sunal* to stand for that proposition; and (4) the referenced portion of *Sunal* is not cited in *Davis*.

First, [redacted] relies on *Davis* to assert that only the Supreme Court's decisions qualify as an "intervening change in the substantive law," but a full reading of *Davis* supports the opposite. As discussed above, it was the Ninth Circuit's decision in *United States v. Fox* that propelled the Supreme Court's decisions that the petitioner could bring a § 2255 proceeding. Recall, that the petitioner's case was remanded for reconsideration considering the Supreme Court's decision in *Gutknecht v. United States*. The district court and the Ninth Circuit ultimately determined that *Gutknecht* did not apply. *Id.* at 339. Later, in *Fox*, a "virtually identical case," the Ninth Circuit determined that *Gutknecht* in fact did apply. *Id.* at 340. The petitioner in *Davis* subsequently brought a motion under § 2255 asserting that the Ninth Circuit's decision in *Fox* changed the law. *Id.* at 340-41. Therefore, the basis of the petitioner's § 2255 petition was not *Gutknecht*, but rather the Ninth Circuit's decision "interpret[ing] and appl[ying]" *Gutknecht* differently in *Fox* than in *Davis*. *Id.* at 346. In other words, the change in law came from the Ninth Circuit's *Fox* decision, not the Supreme Court's decision in *Gutknecht*. As the Supreme Court framed the issue, "[t]he *sole* issue…is the propriety of the Court of Appeals' judgment that a *change in the law of that Circuit* after the petitioner's conviction may not be successfully asserted by him in a § 2255 proceeding." *Id.* at 341 (emphasis added); *see also id.* at 347 (Powell, J. concurring in part and dissenting in part) ("I agree with the Court's holding that review under 28 U.S.C. § 2255 is available to petitioner, due to the intervening change in *the law of the Circuit*.") (emphasis added). In short, [redacted] is asking the Supreme Court to overrule *Davis*, not apply it.

Second, it is not clear that the language that the [redacted] uses is the holding from the case. The focus of the Supreme Court's discussion in *Sunal* centers on procedural default. The Supreme Court is clear that habeas cannot service as an appeal. The discussion that the

[redacted] is relying on is in the section of the opinion discussing whether the petitioner put forth a sufficient justification for their failure to appeal the case. It is not clear from the Supreme Court's reasoning what is doing the work – the fact that there was no Supreme Court decision, which means it was an open question of law or the specific facts of the case namely that it appears the attorneys strategically chose which cases to appeal to get a favorable result.

Third, in general the lower courts have not understood *Sunal* to support the proposition that only Supreme Court decisions constitute a change in the substantive law. As discussed in Part II, most subsequent cases that cite or discuss *Sunal* do so for its holding that *habeas* cannot service as an appeal while very few reference the language used in the [redacted] brief. The Second Circuit discussed that portion of the case in *United States v. Sobell*, 314 F.2d 214 (2d Cir. 1963). The Second Circuit analogizes to the facts of *Sunal* as both defendants had faced a consistent line of lower courts decisions adverse to their position including a case in which the Supreme Court had denied cert. Therefore, the Second Circuit reasons that like *Sunal* this was a case that involved a question of law that had not "changed after the time of appeal expired. It is rather a situation where at the time of the convictions the definitive ruling on the law had not crystallized," which suggests some lower court support for the [redacted] argument. However, in a later opinion the Second Circuit limits *Sunal* to its facts and specifically highlights that the Supreme Court relied heavily on the decision not to appeal the conviction. *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974).

Finally, the [redacted]'s relies on the distinction that Supreme Court drew between *Davis* and *Sunal*. However, the citations in the [redacted] are misleading. While the Supreme Court does distinguish *Davis* and *Sunal*, it is largely on the grounds that *Sunal* involves a purely statutory question. And further, the Supreme Court limits *Sunal* to its facts. The Supreme Court highlights that the dispositive fact in *Sunal* was the petitioner's choice not to appeal the conviction and states "the implication would seem to be that, absent the particular considerations regarded as dispositive in [*Sunal*], the fact that a contention is grounded not in the Constitution, but in the 'laws of the United States' would not preclude its assertion in a § 2255 proceeding." *Id.* at 346. At no point in the opinion does the Supreme Court reference the language in *Sunal* that the [redacted]'s brief relies on.

Applicant Details

First Name	**Will**
Last Name	**Martel**
Citizenship Status	**U. S. Citizen**
Email Address	**willmartel@uchastings.edu**
Address	**Address** Street **825 SHRADER ST** City **SAN FRANCISCO** State/Territory **California** Zip **94117** Country **United States**
Contact Phone Number	**4155094114**

Applicant Education

BA/BS From	**Occidental College**
Date of BA/BS	**May 2019**
JD/LLB From	**University of California, Hastings College of the Law** **http://uchastings.edu**
Date of JD/LLB	**May 18, 2024**
Class Rank	**5%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Wagner National Employment and Labor Law Competition** **National Health Law Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

González, Thalia
gonzalezt@uchastings.edu
Hand, Keith
handk@uchastings.edu
letters@uchastings.edu
(415) 565

This applicant has certified that all data entered in this profile and any application documents are true and correct.

WILL MARTEL

825 Shrader St. • San Francisco, CA 94117 • (415) 509-4114 • willmartel@uchastings.edu

June 12, 2023

The Honorable Beth Robinson
11 Elmwood Avenue, Room 200
Burlington, VT 05401

Dear Judge Robinson,

I am writing to express my strong interest in a 2024–2025 clerkship with your chambers. With family spread out across New Hampshire, Maine, Massachusetts, and Vermont, I hope to start my legal career in New England. It would be an incredible privilege to learn from your experience, not only as an appellate judge, but also as an accomplished civil rights advocate—a career I plan to pursue.

I am a rising third year law student at the University of California College of the Law, San Francisco (formerly UC Hastings College of the Law). I am currently ranked first in my class at UC Law, SF. I received the CALI Award for the top grade in Criminal Law, Contracts Law, Criminal Procedure, Evidence Law, and Negotiation. I have completed a trial advocacy course and competed in three Moot Court competitions, winning a best brief award in one. I have enjoyed studying a range of legal subjects during my time in law school, including courses on property law, criminal law, contracts law, and immigration law. I also have had the opportunity to collaborate closely with my professors: as a research assistant on a number of different legal projects, a teaching assistant for two Legal Research and Writing courses, and a Sack Fellow for Contracts Law. This has allowed me to deepen my knowledge in a variety of areas, hone my research and writing skills, and gain experience providing substantive instruction and feedback to first year law students.

This summer, I am working on the Litigation team at Morison Foerster in San Francisco, but public service has always been important to me. After I completed my undergraduate studies, I worked as an EMT. I deeply valued the opportunity to help others in their most difficult moments. Although I changed career paths, the desire to serve others that pushed me to medicine is the same desire that guides my legal career and drives me to clerk in your chambers. I hope to gain insight into how a federal judge applies the rule of law across a wide range of substantive areas of law while continuing my commitment to public service.

Thank you for your time and consideration of my candidacy. Please feel free to reach out to my recommenders.

Sincerely,

Will Martel

Will Martel

Enclosures: Resume, Writing Sample, Letters of Recommendation, Law Transcript, Undergraduate Transcript

WILL MARTEL

825 Shrader St. • San Francisco, CA 94117 • (415) 509-4114 • will.martel@gmail.com

EDUCATION

UC Law San Francisco (f/k/a UC Hastings), San Francisco, CA
J.D., *Social Justice Lawyering Concentration*, May 2024
GPA: 4.088 | Class Rank: 1/362
Honor Society; Milton D. Green Top Ten Citation; Thurston Society
UC Law SF Moot Court Team, 2022–2023 — Executive Board Member
Third Best Brief in Snodgrass Intramural Moot Court Competition
2022 National Health Law Competition
2023 Wagner National Employment and Labor Law Competition
Prisoner Outreach – *Treasurer*
Human Rights and International Law Organization – *Communications Director*
American Constitution Society – *Vice President of Academic Excellence*
CALI Awards: Criminal Law, Contracts Law, Criminal Procedure, Negotiation, Evidence
100 Pro Bono service hours (as of May 2023); 2023 Wiley W. Manuel Certificate for Pro Bono Legal Services

Occidental College, Los Angeles, CA
B.A., Double Major in Biochemistry and Philosophy (*Awarded Trustee Merit Scholarship*), May 2019
4-year Starting Pitcher on NCAA Baseball team

EXPERIENCE

Morrison Foerster, San Francisco, CA – *Litigation Summer Associate* May 2023 – Present

Professor Thalia González, UC Law SF – *Research Assistant* October 2022 – Present
- Research legal issues. Draft sections of law review articles, policy briefs, and presentations at the intersection of restorative, education, racial, health and economic justice.

UnCommon Law, Oakland, CA – *Student Parole Consultant* September 2021 – January 2023
- Reviewed parole hearing transcripts and case files for people serving life sentences.
- Drafted letters to clients recommending how to discuss criminal/social/disciplinary history, substance use, and more at their upcoming parole hearings.

Sonoma County Public Defender's Office, Santa Rosa, CA – *Summer Law Clerk* July 2022 – August 2022
- Researched and wrote memos and motions for legal issues in felony and misdemeanor cases.
- Conducted client intakes in court. Observed arraignments, settlement conferences, and disposition hearings.

California Appellate Project, San Francisco, CA – *Summer Legal Intern* May 2022 – August 2022
- Researched and screened the case of a client sentenced to death to identify issues for habeas appeal.
- Wrote and presented a memo outlining potential habeas issues.
- Participated in a week-long capital defense training.
- Visited San Quentin State Prison and met with client to discuss case and conditions.

Ogletree Deakins, San Francisco, CA – *Junior Paralegal* January 2020 – August 2021
- Constructed and organized exhibit binders for trial and discovery logs for ongoing litigation.
- Redacted and prepared documents for production and produced documents to opposing counsel.

American Medical Response, Santa Cruz, CA – *EMT* August 2019 – December 2019

VOLUNTEER

Prisoner Outreach, UC Law SF – *Director of Letter Writing Committee* August 2022 – Present

Legal Advice and Referral Clinic, San Francisco, CA – *Student Intake Volunteer* August 2022 – Present

2023 Detention Center Delegation, Nogales, AZ – *Student Volunteer* March 2023

UNIVERSITY OF CALIFORNIA
COLLEGE OF THE LAW, SAN FRANCISCO
200 McALLISTER ST, SAN FRANCISCO, CA 94102

STUDENT'S PERMANENT RECORD

Printed: 05 Jun 2023 Page: 1 of 1

NAME: William C Martel
ID No.: 0591514
Academic Program: JD

21/FA FALL 2021								
	CIVIL PROCEDURE	105	12	A	R	4.0	4.0	16.00
	CRIMINAL LAW	115	12	A+	R	4.0	4.0	17.20
	PROPERTY	125	12	A	R	5.0	5.0	20.00
	LEGAL RESEARCH & WRITING I	131	27	A-	R	3.0	3.0	11.10
						16.0	16.0	64.30 4.019 4.019
22/SP SPRING 2022								
	CONTRACTS	110	22	A+	R	5.0	5.0	21.50
	TORTS	130	22	A	R	4.0	4.0	16.00
	LEGAL RESEARCH & WRITING 2	970	33	A	R	3.0	3.0	12.00
	CONSTITUTIONAL LAW I	120	21	A	R	3.0	3.0	12.00
						15.0	15.0	61.50 4.100 4.058
22/FA FALL 2022								
	RACE, RACISM & AMERICAN LAW	203	11	A	I	3.0	3.0	12.00
	CRIMINAL PROCEDURE	328	13	A+	I	4.0	4.0	17.20
	IMMIGRATION LAW	400	11	A	I	3.0	3.0	12.00
	APPELLATE ADVOCACY: CIVIL	821	12	A-	N	2.0	2.0	0.00
	SOCIAL JUSTCE CONCNTRN SEM 1	830	11	CR	N	1.0	1.0	0.00
	TEACHING ASSISTANT (LRW1)	980	60	CR	N	1.0	1.0	0.00
	MOOT COURT INTERCOLL COMPET	973	11	CR	N	2.0	2.0	0.00
						16.0	16.0	41.20 4.120 4.073
23/SP SPRING 2023								
	EVIDENCE	368	23	A+	I	4.0	4.0	17.20
	RESTORATIVE JUSTICE	662	21	A	I	3.0	3.0	12.00
	TRIAL ADVOCACY I	831	21	A	N	2.0	2.0	0.00
	NEGOTIATION	838	24	A+	N	3.0	3.0	0.00
	SOCIAL JUSTCE CONCNTRN SEM 2	843	21	CR	N	1.0	1.0	0.00
	MOOT COURT INTERCOLL COMPET	973	21	CR	N	2.0	2.0	0.00
	WRITING REQ'T FOR LAW 66221	998	30	M	N	0.0	0.0	0.00
	SPRNG BRK IMMIGRATN PRACTICUM	803	21	CR	N	2.0	2.0	0.00
						17.0	17.0	29.20 4.171 4.088

Comments
Honors & Awards:
Milton D. Green Top Ten Citation - 1st Year Class 2021-2022
UC Hastings Honor Society
Thurston Society 2021-2022

C U M U L A T I V E T O T A L S

Cred. Att.	Cred. Cpt.	GPA Cred.	Grade Pts.	GPA
64.00	64.00	48.00	196.20	4.088

REJECT DOCUMENT IF SIGNATURE BELOW IS NOT CLEAR

Amy VanMullekom, Registrar

THE NAME OF THE COLLEGE IS PRINTED IN WHITE LETTERS ON THE FACE OF THE TRANSCRIPT. TRANSCRIPTS WITHOUT THIS NOTATION ARE UNOFFICIAL.

Thalia González
Professor of Law
Harry & Lillian Hastings Research Chair
Senior Scholar, UCSF/UC Law SF Consortium on Law, Science & Health Policy

UC Law San Francisco | 200 McAllister Street | San Francisco, CA 94102
phone 628 227 0919 | gonzalezt@uchastings.edu | uchastings.edu

Dear Honorable Judge:

I am delighted to write a letter of recommendation reflecting my overwhelming support for William Martel's application to be a judicial clerk in your chambers. It is without any hesitation that I enthusiastically support his application and share my reflections and experiences with Mr. Martel. Simply put, he is a professional, talented, thoughtful, and highly motivated law student with excellent writing and analytical skills. Though I have recently joined the University of California College of the Law, San Francisco (formerly UC Hastings) faculty, I have been a legal academic for fifteen years. I would isolate Mr. Martel as one of the best students not only in my courses, but also with whom I have worked with as a research assistant. I met Mr. Martel within the first few days that I was on campus and was immediately impressed by his acumen and interest in my research—he asked probing questions about areas that do not always draw student attention. As these initial interactions have borne out over the year, Mr. Martel is student who brings great thoughtfulness to his work and genuine interest in learning. He is highly motivated by intellectual curiosity and a commitment to excellence. I look forward to following his legal career and know he will be a shining star in whatever pathway he follows.

Before discussing Mr. Martel's skills as a research assistant, I would like to reflect on his academic performance in the classroom. At the University of California College of the Law, San Francisco I teach Constitutional Law I and multiple upper division courses. I am a faculty co-director of the Center for Racial and Economic Justice and a Senior Scholar in the UCSF-UC Law Consortium Law, Science, and Health Policy. In addition to my tenured faculty teaching position at the University of California College of the Law, San Francisco, I have held a research appointment at Georgetown University Law Center since 2017. All of this is to say, I am quite familiar with excellent students and my remarks about Mr. Martel should be understood in this context.

As his overall academic record reflects, Mr. Martel is at the very top of his class. He won the "Best Brief Award" for Legal Research and Writing in his first year and served as a teaching fellow for a first-year Contracts section. These are not isolated accolades for Mr. Martel. His achievements in the larger law school community are consistent with his outstanding performance in my courses. This year, I had the pleasure of Mr. Martel enrolling in two of my courses: Race, Racism, and American Law (Fall 20232) and Restorative Justice (Spring 2023). In each of these courses his performance earned him the highest grade.

In Race, Racism and American Law, I "cold call" students, and Mr. Martel was always well prepared when called on. His analysis of the doctrine was clear and consistent. Additionally, he artfully invited his peers to participate in discussion, often posing provocative questions that yielded significant interaction. In this manner, I would characterize Mr. Martel's role in the classroom as one of a leader. Unlike some students who view participation or leadership as a constant performance—that can disengage others—Mr. Martel was reflective and choose his interventions in the larger discussions with care.

In the three writing assignments required during the term, Mr. Martel demonstrated a superior command of the doctrine, ability to craft arguments, and develop normative claims. An additional assignment in the course required students to work collaboratively and independently—from the selection of materials for a specific session to teaching these materials to the entire class. Though there were no assigned leaders for each cohort, it was clear to me that Mr. Martel was the unspoken leader in his group. In addition to skillfully co-teaching on the selected topic, the group prepared an external set of resources to scaffold that day's session. It is such "above and beyond" excellence that I have seen Mr. Martel exhibit as my research assistant. And, I now know it was his idea to create these resources.

In addition to excellence during the term, Mr. Martel's performance on the final examination placed him at the top of the class. His final examination (open book, timed, six questions) was quite difficult. To be successful on an examination of this nature requires not only mastery of the course material but the ability to think critically and synthesize ideas in a highly organized manner. While one might assume open book creates ease, it is often quite challenging for students as they struggle to distill central ideas and arguments while remaining responsive to the questions posed. In re-reading his examination before writing this letter my reflection on the answers are quite simple, they were exceptional.

Mr. Martel's superb course performance, as well as his intellectual curiosity and collegiality, prompted me to invite him to be a research assistant. In this role, he has been even more outstanding. There are simply too many examples for me to describe! Mr. Martel has approached every assignment with thoughtfulness and attention to detail. And—no matter how large or small—his professionalism has been clear. Before each assignment, we meet and Mr. Martel takes careful notes and asks specific questions. He then checks in as needed with me for any clarification, not in a burdensome way, and returns to me high quality work on or before the date we agreed upon it was due. As we have been working together now for multiple months, Mr. Martel has also developed keen insights as to the robust portfolio of work that I maintain and checks in, without prompting, to see if there are smaller tasks that I need taken off my plate.

I would like to share one example of his professionalism and attention to detail that occurred last month. With very little notice from the producer, I was invited to speak as an expert commentator on PBS NewsHour. While we are all used to working under short deadlines, the timing was exacerbated by the fact that I was in Baltimore to give the keynote at a conference at Johns Hopkins University. I sent Mr. Martel a quick email asking him to send me his existing research on pending and recently passed legislation for a media call. I did not identify it was for PBS NewHour specifically. He replied to my email in minutes and within a few hours had sent me not only the prior research, but updated it (without my asking), adding short parentheticals about each law, including its current status in the legislative process. He also organized the legislation by topical areas. His quick response and additional thinking, again without prompting, was used not only by me in the interview but by PBS NewsHour in a visual they created for the segment. This is not an isolated instance where Mr. Martel's work was invaluable to me. I am confident in stating that he will be strong, reliable, and independent law clerk who can keep things moving smoothly in a busy chamber.

Mr. Martel's research and writing skills are not limited to discrete assignments. He has worked on sections of four articles, including first round technical above-the-line drafting, as well as data analysis and drafting of "plain language" text for a report for a grant funded project. I have been so impressed with Mr. Martel's work, that this summer we are co-authoring an essay in the area of education law. While some faculty regularly write with their research assistants, this is not my standard

practice as the areas in which I work do always lend themselves to collaboration with less experienced scholars. Mr. Martel has shown me that his work is of this caliber I expect and I look forward to developing this manuscript.

Turning to briefly to Mr. Martel's performance in another course, Restorative Justice, I was also able to appreciate his high-quality research and writing skills. In this upper division seminar, Mr. Martel met his law school writing requirement with the seminar paper. Taking an ambitious route with his paper, he decided to employ a modified social science methodology to code the content of victim impact statements from parole hearing transcripts and analyze their restorative efficacy. When Mr. Martel first introduced this topic in class—as one of five scaffolded assignments in the term— I was candidly dubious about his potential to complete the analysis and interlock it with a substantive theoretical grounding in one term. We met multiple times throughout the term as he grappled with the more challenging aspects of the project and I lent assistance on the empirical analysis design. I am pleased to say, Mr. Martel proved me wrong and earned the highest grade in the course. I believe his paper is a valuable contribution to the literature and I have offered to help him finalize it for submission for publication in a law review.

My final reflections about Mr. Martel's skills as a future law clerk are about who he is as a person. He is trustworthy, committed to justice, and highly values professional relationships. He understands what is means to be hard-working, open-minded, and respectful. He can bring levity to a situation when it is warranted and quiet deliberation when that is what is needed. Simply put, he is collegial, humble, and a pleasure to engage with. Each of these skills will serve him well in your chambers. While Mr. Martel is confident in his work, his commitment to excellence never diminishes the work of others. I have observed his working relationship with my other two research assistants and it is clear that he has sharp interpersonal skills and a keen understanding of how to contribute in a team, knowing when to step up and step back. Again, a valuable asset as a law clerk and legal professional.

Thank you for the opportunity to reflect on Mr. Martel's qualifications to serve as a law clerk. He is the only student I am supporting this year and if you have any questions about his qualifications or experience, please do not hesitate to contact me. I can be reached at 480-707-8894 or gonzalezt@uchastings.edu.

Sincerely,

Thalia González
Professor of Law
Harry & Lillian Hastings Research Chair
Co-Director, Center for Racial and Economic Justice

June 12, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing to share my enthusiastic support for William Martel's application to serve as a judicial clerk in your chambers. Mr. Martel is a brilliant, highly motivated, and giving law student with a deep intellect, superior writing and analytical skills, and an exceptional work ethic. I have taught at the University of California College of the Law, San Francisco (formerly UC Hastings) for fifteen years, and Mr. Martel is one of the best students I have ever had the pleasure of working with. He is the type of star student that comes along once in a decade and reinvigorates one's commitment to teaching. I have no doubt that I will be hearing about his many achievements in the legal profession for years to come, and I give him my highest and most enthusiastic recommendation for a judicial clerkship.

There are so many positive things to say about Mr. Martel that it is difficult to know where to begin. I teach Contracts in the first-year curriculum and several comparative and international law courses in the upper division. I had the pleasure of having Mr. Martel in my Contracts section for the Spring 2022 term. He demonstrated the highest standards of professionalism throughout the semester. I "cold call" students in the course, and Mr. Martel was consistently well prepared when called on. He was regular volunteer contributor and enriched our discussions with thoughtful critiques on the cases. In his two written assignments during the term, he demonstrated superior issue spotting and legal analysis skills.

Mr. Martel's performance on my final exam placed him at the very top of my Contracts course. The final examination for this course was quite difficult. Success on the examination required thorough preparation, strong writing and organizational skills, and the ability to think clearly under pressure. Mr. Martel finished first out of 92 students and almost 30 points ahead of the second ranked student in the course (setting himself apart from even the best students to a degree I have only seen a few times in fifteen years of teaching). He was kind enough to allow me to use his exam as a model for other students. I re-read one of his exam essays before writing this letter, and it is nearly flawless. He spotted every legal issue and constructed concise, well-organized, and persuasive arguments to address them. The high quality of his legal analysis and prose was extraordinary for a completely closed book, timed exam. Indeed, there are only a few students who could draft an essay of the same quality even with unlimited time and access to notes and materials. I don't award grades of A+ every year, but I did so for Mr. Martel without a moment of hesitation.

Mr. Martel's outstanding course performance, as well as his collegiality and desire to support fellow students, prompted me to invite him to serve as a "Sack Fellow" in my Spring 2023 Contracts section. At UC Law SF, every first-year JD student has two five-unit courses in which the professor allocates additional time and resources to cultivate student legal analysis and writing skills. Students in these courses receive individualized feedback on two written assignments. Sack Fellows are high-performing upper division students who provide this individualized feedback and serve as mentors. I have very high standards for Sack Fellows and only invite students to serve in this capacity if I am certain they have both the academic skills and the temperament to support our 1Ls. I was very pleased when Mr. Martel accepted my invitation. His high quality, thoughtful, and timely feedback to students exceeded the high expectations I had when I invited him, even as he pursued an overload schedule of 17 credits that term. Many Sack Fellows struggle to balance positive and critical feedback, but Mr. Martel demonstrated a strong ability to provide the candid assessments students need while also encouraging them to take the next steps in their work. While Sack Fellows receive a modest stipend, I don't think that is what motivated Mr. Martel to accept the role. He seemed to genuinely enjoy the opportunity to mentor students and contribute to the law school community.

This last observation brings me to another of Mr. Martel's notable qualities – his strong sense of social responsibility and desire to serve others. In addition to his service as a Sack Fellow in Contracts and a teaching assistant in Legal Research and Writing, Mr. Martel is a student in our social justice concentration and worked as a summer law clerk in the Sonoma County Public Defender's Office. At the beginning of his second year at the law school, he approached me for advice about his 2L summer. Mr. Martel had received an offer from one of the top law firms in the Bay Area. He felt conflicted about accepting it because he worried about giving up a precious opportunity to continue his public service work. I was moved by his thoughtful deliberation, and we had a long conversation about his interests and professional goals. I shared my own experience working at Paul Weiss in New York and mentioned that he likely would have opportunities to do some pro bono work at his firm. I advised him to trust his instincts. But I also encouraged him accept the offer, noting that the experience and contacts would be quite valuable and that work for a large firm often opens doors in public service (as it did for me).

It is my understanding that Mr. Martel has compiled an academic record that places him at the very top of his class at UC Law SF. I also understand that he won the "Best Brief Award" for Legal Research and Writing in his first year. Several weeks ago, I had the pleasure of reviewing several legal briefs Mr. Martel researched and wrote over the past year. The two briefs demonstrate the same qualities that stood out to me in his writing for my Contracts course – exceptionally clear, persuasive legal analysis and concise, polished, error-free prose. I was not at all surprised to learn of Mr. Martel's many achievements and the further development of his legal writing. His academic and extracurricular record at UC Law SF is entirely consistent with his outstanding performance in my course.

Keith Hand - handk@uchastings.edu - letters@uchastings.edu
(415) 565

Finally, Mr. Martel is a true pleasure be around. He is diligent, open-minded, and respectful to those around him. He is the kind of person that a faculty member, fellow student, and employer can depend on when the workload gets heavy. I know he will continue to display these qualities as a legal professional.

Mr. Martel is the one student I am promoting for a clerkship this year. He has an excellent reputation, a proven track record, the drive to contribute and succeed, and all of the tools to be an outstanding clerk and lawyer. I have every confidence that if you schedule Mr. Martel for an interview, you will see in him the same great skills and potential that he has demonstrated to me and to many others at UC Law SF.

I would welcome the opportunity to talk with you in greater detail about Mr. Martel. If you would be interested in doing so, please don't hesitate to contact me by phone or E-mail. My work phone is 415-565-4803, and my E-mail address is handk@uchastings.edu.

Sincerely,

Keith J. Hand
Professor of Law

WILL MARTEL

825 Shrader St. • San Francisco, CA 94117 (415) 509-4114 • willmartel@uchastings.edu

WRITING SAMPLE

The attached writing sample is an excerpt from a brief I submitted for the David E. Snodgrass Intramural Moot Court Competition. The case was a hypothetical appeal to the United States Supreme Court from the Fifth Circuit's decision in *Hope v. Harris*, No. 20-40379 (5th Cir. 2021). Mr. Hope challenged the constitutionality of his twenty-seven-year imprisonment in solitary confinement. The question presented for the competition was:

> Under the Eighth Amendment, does prolonged solitary confinement constitute cruel and unusual punishment *per se* when prison officials isolate a person in physically and psychologically dangerous conditions for an extended period of time?

I represented the Respondent, Mr. Dennis Wayne Hope. This sample is not edited by others and is entirely my own work.

I. RESPONDENTS VIOLATE THE EIGHTH AMENDMENT BY SUBJECTING HOPE TO PROLONGED SOLITARY CONFINEMENT IN UNSANITARY AND DANGEROUS CONDITIONS.

The Eighth Amendment provides, "[e]xessive bail shall not be required . . . nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "The Amendment proscribes 'all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)). This Court recognizes two approaches to analyzing an Eighth Amendment claim. The first is a categorical analysis, in which an entire class of punishment is found unconstitutional if it violates "the evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The second is a case-by-case analysis, which requires a claimant to prove (1) their conditions of confinement pose "objectively, a sufficiently serious" threat to their health or safety, and (2) prison officials acted with "deliberate indifference" to that threat. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

This Court should find all Respondents violated the Eighth Amendment because prolonged solitary confinement contravenes "the evolving standards of decency that mark the progress of a maturing society" and therefore constitutes cruel and unusual punishment *per se*. *See Trop*, 356 U.S. at 101. Even if this Court declines to endorse a *per se* rule, the particular conditions of Hope's confinement violate the Eighth Amendment because they pose "objectively, a sufficiently serious" threat to Hope's health and safety, and all Respondents acted with "deliberate indifference" to that threat. *See Farmer*, 511 U.S. at 834.

A. Prolonged Solitary Confinement Is Unconstitutional *Per Se* Because It Violates the Evolving Standards of Decency.

"This Court has held that the Eighth Amendment incorporates 'evolving standards of decency.'" *United States v. Briggs*, 141 S.Ct. 467, 472 (2020) (quoting *Kennedy*, 554 U.S. at 419).

A punishment is cruel and unusual if it violates "the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. To determine if a punishment violates the evolving standards of decency, this Court considers (1) whether there is a consensus against the punishment and (2) whether prohibiting the punishment is consistent with this Court's understanding of the text of the Eighth Amendment. *Kennedy*, 554 U.S. at 419. This Court has applied this two-part test to declare certain punishments are too barbaric, and therefore "[are] not weapon[s] that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be." *Trop*, 356 U.S. at 93. This Court has held, for example, a state may not execute an intellectually disabled person because doing so "is nothing more than the purposeless and needless imposition of pain and suffering." *Atkins*, 536 U.S. at 319. Likewise, the prolonged solitary confinement inflicted on Hope is a "purposeless and needless imposition of pain and suffering." *Id.*

Prolonged solitary confinement violates the evolving standards of decency and is therefore unconstitutional. Hope's conditions of confinement reflect the use of prolonged solitary confinement across the country, offering this Court its first opportunity to evaluate the constitutionality of the practice. *See Davis v. Ayala*, 576 U.S. 257, 286–87 (2015) (Kennedy, J., concurring) (requesting this Court examine and reject the practice of prolonged solitary confinement); U.S. Dep't of Just., *Report and Recommendations Concerning the Use of Restrictive Housing* 3 (2016). Hope is confined to a fifty-four square-foot cell for at least twenty-three hours per day. J.A. 31–32. He has only nine square feet of space to move around in his cell, and he has no human contact beyond interactions with prison staff. J.A. 32–33. The United Nations classifies these conditions as torture when they last longer than fifteen consecutive days. G.A. Res. 70/175,

Rule 44, at 17 (Dec. 17, 2015). Hope has suffered in these conditions for nearly thirty years. J.A. 31.

1. Legislative action and professional agreement establish a consensus against prolonged solitary confinement.

This Court begins its evolving standards of decency inquiry by searching for the "existence of objective indicia of consensus against [the punishment.]" *See Kennedy*, 554 U.S. at 422. In fact, this Court "should be informed by objective factors to the maximum possible extent . . . before bringing its own judgment to bear on the matter." *Enmund v. Florida*, 458 U.S. 782, 788–89 (1982). State legislative action and professional agreement are strong indicators of a consensus against a punishment. *Kennedy*, 554 U.S. at 421; *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988).

"[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S. at 312 (quotations omitted) (citing *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). State legislatures provide an important window into shifts in penal practices. *See id.* A review of state legislatures demonstrates a growing consensus against prolonged solitary confinement.

Noting the significant cruelty of solitary confinement, many states have taken action to ban or limit the use of the punishment inflicted on Hope. In fact, six states prohibit the use of solitary confinement for longer than fifteen to thirty days.[1] Eleven state legislatures recently introduced similar restrictions, and two of those efforts ended with non-legislative plans to limit the practice.[2]

[1] Colo. Rev. Stat. Ann. § 17-26-303 (West 2022) (fifteen days); Conn. Gen. Stat. Ann. § 18-96b (West 2022) (fifteen days); N.J. Stat. Ann. § 30:4-82.5 (West 2022) (twenty days); N.Y. Correct. Law § 137 (McKinney 2022) (fifteen days); Del. Dep't of Corr., *Elimination of Restrictive Housing in DOC* 1 (2020) (fifteen days); Phaedra Haywood, *Has New Mexico Corrections Department Limited Use of Solitary Confinement?*, Santa Fe New Mexican (Dec. 18, 2021), https://www.santafenew mexican.com/news/local_news/has-new-mexico-corrections-department-limited-use-of-solitary-confinement/article_77476ce4-5485-11ec-b32e-47a54ca5ab29.html (thirty days).

[2] A.B. 2632, 2021–22 Reg. Sess. (Cal. 2022) (vetoed by Governor with directions for California Department of Corrections and Rehabilitation to develop its own plan to limit solitary confinement); S.B. 108, Gen. Ass. of Va., 2022

An additional twelve states outright prohibit the use of solitary confinement on certain populations, such as juveniles, pregnant women, or people with mental illnesses.[3] In total, twenty-eight states have taken action to prohibit or restrict solitary confinement. The substantial legislative action against solitary confinement demonstrates a consensus against the punishment Respondents inflicted on Hope. Additionally, the current trend of prohibiting or restricting prolonged solitary confinement demonstrates the consensus is growing. Because this Court relies heavily on state legislatures to establish a consensus against a type of punishment, the substantial legislative action is strong evidence of a consensus against prolonged solitary confinement. *See Atkins*, 536 U.S. at 312.

For further evidence of a consensus against a punishment, this Court considers the "the views that have been expressed by respected professional organizations." *Thompson v. Oklahoma*, 487 U.S. at 830 (finding the views of the American Bar Association and the American Law Institute evinced a consensus against the death penalty for juveniles).

Leading American medical, legal, and correctional organizations recognize the inhumanity and danger of prolonged solitary confinement. The American Public Health Association found

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Sess. (Va. 2022) (amended to direct Department of Corrections to study its use of solitary confinement); S.B. 3344, 31st Leg. (Haw. 2022); H.B. 615, 2022 Reg. Sess. (Ky. 2022); H.B. 1756, 67th Leg., 2022 Reg. Sess. (Wash. 2022); H.B. 4822, W. Va. Leg., 2022 Reg. Sess. (W. Va. 2022); H.B. 5740, Gen. Ass., Jan. Sess. 2021 (R.I. 2021); L.D. 696, 130th Leg., 1st Reg. Sess. 2021 (Me. 2021); S.B. 685, Gen. Ass., 2021 Sess. (Pa. 2021); S.B. 1617, 54th Leg., 2d Reg. Sess. (Ariz. 2020); H.B. 0259, 100th Gen. Ass. (Ill. 2019).

[3] Ark. Code Ann. § 12-29-118 (West 2022) (juveniles); Ark. Code Ann. § 12-32-104 (West 2022) (inmates who are pregnant or recently gave birth); Ga. Code Ann. § 42-1-11.3 (West 2022) (inmates who are pregnant or recently gave birth); La. Stat. Ann. § 15:905 (West 2022) (juveniles); Md. Code Ann., Corr. Servs. § 9-601.1 (West 2022) (pregnant inmates); Md. Code Ann., Corr. Servs. § 9-614.1 (West 2022) (juveniles); Minn. Stat. Ann. § 243.521 (West 2022) (people with mental illness); Mont. Code Ann. § 53-30-703 (West 2022) (inmates who are pregnant or recently gave birth); Mont. Code Ann. § 53-30-720 (West 2022) (juveniles); Neb. Rev. Stat. Ann. § 83-173.03 (West 2022) (pregnant inmates, people with mental illness or traumatic brain injury, juveniles); Or. Rev. Stat. Ann. § 169.750 (West 2022) (juveniles); W. Va. Code Ann. § 49-4-721 (West 2022) (juveniles); Prisoners' Legal Servs. of Mass., *Criminal Justice Reform Act (CJRA) Reforms and Regulations*, https://plsma.org/find-help/solitary-confinement/ (last visited Oct. 15, 2022) (people with mental illness); Chuck Sharman, *Michigan DOC Eases up on Pregnant Prisoners* (2021), https://www. prisonlegalnews.org/news/2021/nov/1/michigan-doc-eases-pregnant-prisoners-limits-shackles-and-solitary-confinement/ (pregnant inmates); Am. Civ. Liberties Union, *Groundbreaking Federal Consent Decree Will Prohibit Solitary Confinement of Youth in Mississippi* (2021), https:// www.aclu.org/press-releases/groundbreaking-federal-consent-decree-will-prohibit-solitary-confinement-youth (juveniles).

"[p]unitive segregation should be eliminated," noting "[m]ultiple professional organizations and human rights bodies have taken positions supporting the restriction or abolition of solitary confinement."[4] The Commission on Safety and Abuse in America's Prisons—a diverse group of civic leaders, correctional administrators, advocates, law enforcement professionals, and others—recommends prison officials "[e]nd conditions of isolation" and "[e]nsure that segregated prisoner[s] have regular and meaningful human contact and are free from extreme physical conditions that cause lasting harm." John J. Gibbons & Nicholas de Belleville Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, 22 Wash. U. J. L. & Pol'y 385, 405 (2006). The American Bar Association asserts "while it may be necessary physically to separate prisoners . . . that separation does not necessitate [] social and sensory isolation[.]"[5] In recent years, circuit courts have noted the professional consensus against prolonged solitary confinement. *See, e.g., Porter v. Pennsylvania Dep't of Corr.*, 974 F.3d 431, 441–42 (3d Cir. 2020); *Porter v. Clarke*, 923 F.3d 348, 356 (4th Cir. 2019). The unanimity of professional organizations against the conditions suffered by Hope further indicates the consensus against prolonged solitary confinement.

2. This Court's precedent and the history of the Eighth Amendment demonstrate prolonged solitary confinement is unconstitutional.

"[C]onsensus, while entitled to great weight, is not itself determinative of whether a punishment is cruel and unusual." *Graham v. Florida*, 560 U.S. 48, 67 (2010). "[I]t is for [this Court] ultimately to judge whether the Eighth Amendment permits the imposition of" solitary confinement. *Kennedy*, 554 U.S. at 434 (quoting *Enmund*, 458 U.S. at 797). To make that

[4] Am. Pub. Health Ass'n, *Solitary Confinement as a Public Health Issue* (2013), https://apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue.

[5] Am. Bar Ass'n, *ABA Cites Growing Concerns About Solitary Confinement*, Washington Letter (Mar. 2014), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/governmental_affairs_periodicals/washingtonletter/2014/march/solitary/.

determination, this Court looks to "controlling precedents and the Court's own understanding and interpretation of the Eighth Amendment's text." *Graham*, 560 U.S. at 61.

To determine whether the Eighth Amendment prohibits prolonged solitary confinement, this Court must apply its "own understanding of the Constitution and the rights it secures." *Kennedy*, 554 U.S. at 434. "The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances." *Graham*, 560 U.S. at 59. The question, then, is whether the Framers would have considered the Eighth Amendment to proscribe prolonged solitary confinement in conditions such as those suffered by Hope. A historical analysis reveals the current practice of solitary confinement—characterized by its conditions, duration, and widespread use—did not exist until the late twentieth century. The Framers of the Eighth Amendment did not contemplate the current practice of solitary confinement, and it is not constitutionally enshrined.

The Eighth Amendment was ratified in 1791, and its authors' exclusive concern was the "prevention of torture." U.S. Const. amend. VIII; *Furman v. Georgia*, 408 U.S. 238, 380 (1972) (Burger, C.J., dissenting). Noting this intent, some members of this Court have been hesitant to find punishments unconstitutional if they were not "impermissibly cruel at the time of the adoption of the Eighth Amendment." *Furman*, 408 U.S. at 380 (Burger, C.J. dissenting) (noting the death penalty was not considered torturous at the time of the adoption of the Eighth Amendment); *McGautha v. Cal.*, 402 U.S. 183, 226 (1971) (Black, J., separate opinion) (arguing the Eighth Amendment "cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law . . . at the time the Amendment was adopted").

The prolonged solitary confinement inflicted on Hope—involving nearly thirty years of severe social isolation in extremely cramped conditions for almost twenty-four hours per day—

was not a common or accepted penal practice until the late-twentieth century. J.A. 31–32; Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement,* 23 N.Y.U. Rev. L. & Soc. Change 477, 494–95 (1997). The authors of the Eighth Amendment could not have contemplated its application to prolonged solitary confinement, since that penal practice did not develop for over 150 years. *See* Haney & Lynch, *supra*, at 494–95. In fact, American prisons only began using solitary confinement—of any length––in the late-eighteenth century. *Id.* at 483. At the time of the Eighth Amendment's ratification, solitary confinement was in its early stages, and judges, journalists, and penal experts doubted its efficacy. *Id.* States across the country continued to experiment with solitary confinement through the nineteenth century. *Id.* at 483–84. However, by the beginning of the twentieth century, states had almost entirely abandoned the practice, noting its cruelty and ineffectiveness. *Id.* at 485–87; *see In re Medley*, 134 U.S. 160, 168 (1890) (noting that, in the mid-nineteenth century, "solitary confinement was found to be too severe").

Unlike other punishments, prolonged solitary confinement was not a common or accepted practice at the time of the Eighth Amendment's ratification, nor is it enshrined elsewhere in the Constitution. *See In re Medley*, 134 U.S. at 494–95; *Furman*, 408 U.S. at 380 (Burger, C.J., dissenting) (noting references to the death penalty in the First and Fifth Amendments); *McGautha*, 402 U.S. at 226 (Black, J., separate opinion) (noting the accepted use of the death penalty at the time the Eighth Amendment was ratified). In fact, this Court has noted the particular cruelty of solitary confinement. *In re Medley*, 134 U.S. at 168 (noting the deleterious effects of solitary confinement). Prohibiting prolonged solitary confinement, a punishment characterized by mentally and physically agonizing conditions, J.A. 31–33, aligns with the Eighth Amendment's

purpose of prohibiting torturous punishments. *See Furman*, 408 U.S. at 377 (Burger, C.J., dissenting).

Prolonged solitary confinement violates the evolving standards of decency. State legislative action and professional organizations demonstrate a strong and growing consensus against prolonged solitary confinement, and this Court's interpretation of the Eighth Amendment supports prohibiting the practice. Prolonged solitary confinement is unconstitutional *per se*, and Hope's nearly thirty-year isolation violates the Eighth Amendment.

B. Even if Prolonged Solitary Confinement Is Not Unconstitutional *Per Se,* Hope's Particularly Long, Unsanitary, and Dangerous Conditions of Confinement Violate the Eighth Amendment.

In addition to considering categorical challenges to types of punishment, this Court analyzes Eighth Amendment challenges to particular conditions of confinement under a separate case-by-case analysis. *See, e.g., Farmer*, 511 U.S. at 834; *Wilson v. Seiter*, 501 U.S. 294, 296–97 (1991). Under this case-by-case approach, conditions of confinement violate the Eighth Amendment if (1) they pose "objectively, a sufficiently serious" threat to an incarcerated individual's health or safety, and (2) prison officials act with "deliberate indifference" to such health or safety threat. *Farmer*, 511 U.S. at 834. Courts refer to these two elements as the objective and subjective prongs of the analysis. *See, e.g., Johnson v. Prentice*, 29 F.4th 895, 904 (7th Cir. 2022); *Porter v. Clarke*, 923 F.3d at 355.

1. The dangerous and unsanitary conditions of Hope's prolonged solitary confinement pose a substantial risk of serious harm.

Hope's conditions meet the objective prong because his confinement poses "a sufficiently serious" threat to his health and safety. *Farmer,* 511 U.S. at 834. A threat to health or safety is sufficiently serious if it "result[s] in the denial of the minimal civilized measure of life's necessities[.]" *Id.* at 834 (quotations omitted). Prison officials "must provide humane conditions

of confinement . . . and take reasonable measures to guarantee the safety of the inmates." *Id.* at 832 (quotations omitted). The length of confinement is an important factor because conditions "might be tolerable for a few days and intolerably cruel for weeks or months." *Hutto v. Finney*, 437 U.S. 678, 686–87 (1978). Hope's conditions of confinement pose substantial risks to his physical and psychological health, and he has been exposed to those conditions for nearly thirty years. J.A. 31.

Several circuit courts have considered whether prolonged solitary confinement alone creates a sufficiently serious threat to a person's health and safety. *See, e.g., Porter v. Pa.*, 974 F.3d at 441; *Porter v. Clarke*, 923 F.3d at 355. The Third and Fourth Circuits have held prolonged solitary confinement creates a substantial risk of harm. *See Porter v. Pa.*, 974 F.3d at 441; *Porter v. Clarke*, 923 F.3d at 355. The Third Circuit noted, "virtually *everyone*" exposed to sensory deprivation is harmed. *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 566 (3d Cir. 2017) (emphasis in original). Other circuits hold prolonged solitary confinement contributes to the risk of harm, but a claimant needs to allege personal and specific deprivations to satisfy the objective prong. *See Isby v. Brown*, 856 F.3d 508, 522 (7th Cir. 2017) (holding claimant must provide evidence of specific and individualized harms); *Quintanilla v. Bryson*, 730 F. App'x 738, 747 (11th Cir. 2018) (holding isolation in unsanitary conditions created a substantial risk of harm). No circuit has directly held prolonged solitary confinement alone does *not* create a serious and substantial risk of harm. *See Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739, 763–64 (10th Cir. 2014) (noting conditions of solitary confinement could establish a constitutional claim, despite finding thirty-year isolation was not unconstitutional because inmate posed significant security threat).

Hope's conditions of isolation pose a substantial risk of serious psychological harm, and he has been subjected to those conditions for almost thirty years. J.A. 31–32. Solitary confinement

of any length can cause psychosis, PTSD, paranoia, impulse control issues, insomnia, depression, and other psychological harms. Kayla James & Elena Vanko, *The Impacts of Solitary Confinement* 1–2 (2021). The risk of psychological harm increases in frequency and severity the longer a person suffers in isolation. *Id*. Hope himself suffers from insomnia, anxiety, depression, thoughts of suicide, and visual and auditory hallucinations. J.A. 34, 37–38. The cacophony of noise in the unit prevents Hope from sleeping for more than thirty minutes at a time. J.A. 38. From 2012 to 2018, Respondents moved Hope to over 263 different cells, many of which were unsanitary. J.A. 36. The disturbance from these frequent moves to unhealthy conditions contributed to Hope's anxiety and insomnia. J.A. 43. Hope's conditions of confinement cause many forms of psychological harm. *See* J.A. 31.

Hope's conditions of confinement also create a substantial risk of serious physical harm. People subjected to solitary confinement are 6.9 times more likely to commit acts of self-harm and 6.3 times more likely to commit potentially fatal acts of self-harm. Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 Am. J. Pub. Health 445–46 (2014). Hope has watched many other people in the SHU harm themselves and take their own lives and Hope himself has contemplated suicide. J.A. 38. Additionally, Respondents confined Hope in cells covered in feces, urine, and black mold. J.A. 36. These unsanitary conditions pose a serious risk to Hope's health. Hope is also exposed to chemical agents such as tear gas, pepper spray, and pepper balls, often for a prolonged period of time because Respondent Rehse refuses to turn on exhaust fans to clear the gas. J.A. 34. On one occasion, Respondents left Hope naked and covered in pepper spray for eight days. J.A. 36. Exposure to chemical agents, especially without subsequent cleaning or treatment, poses a significant threat to Hope's health. Hope's conditions create a serious risk of self-harm and pose a substantial threat to his health and safety.

This Court should hold the objective prong is met because Hope's near thirty-year isolation in dangerous and unsanitary conditions creates a substantially serious risk of physical and psychological harm.

2. Respondents confined Hope in dangerous and unsanitary conditions with reckless indifference to his health and safety.

Hope's *pro se* complaint meets the subjective prong because he sufficiently alleges all Respondents acted with "deliberate indifference to [his] health or safety." *Farmer*, 511 U.S. at 834. "[D]eliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." *Farmer*, 511 U.S. at 836. Reckless indifference "can be inferred from the fact the risk of harm is obvious." *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). A risk is obvious if the risk is "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past." *Farmer*, 511 U.S. at 842. All Respondents acted with reckless indifference to the substantial and obvious risks of Hope's confinement.

All Respondents were aware of the conditions Hope was subjected to. J.A. 30–31. All seven Respondents are prison officials employed at the facility where Hope is incarcerated. J.A. 30–31. Hope sufficiently alleges that all seven Respondents are aware of his conditions and treatment. J.A. 30–31. The physical and psychological dangers of Hope's conditions are "well established in both case law and scientific and medical research." *Porter v. Pa.*, 974 F.3d at 441. Additionally, because prison officials possess unique and intimate knowledge of the risks of solitary confinement, they cannot claim ignorance of those obvious dangers. *See id.* at 447. A prison official would need to actively disregard the ongoing penological discourse to ignore these dangers, as "[a] wide range of researchers and courts have repeatedly described the serious risks associated with solitary confinement." *Id.* at 446. In fact, organizations run by and representing prison officials have noted the dangers of solitary confinement and commented on the need to limit

the practice. *See* Ass'n of State Corr. Adm'rs & The Liman Program, Yale L. Sch., *Time in Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* 54–59 (2015). Because Hope's isolation has lasted nearly three decades, the risk of harm was especially obvious to Respondents. *See Porter v. Pa.*, 974 F.3d at 447 (holding prison officials are necessarily aware of the risks posed by solitary confinement lasting thirty-three years). In fact, Hope alleges all Respondents "are aware of the harmful effects of long-term isolation and the toll it takes on the human body and brain." J.A. 43. Despite their knowledge and awareness of the serious risks posed to Hope's health and safety, all Respondents "work together to ensure Mr. Hope continues to be subjected to these inhumane conditions." J.A. 43–44. All Respondents were aware of the obvious and substantial risks posed by the conditions of Hope's confinement, and all Respondents acted with reckless indifference to those risks. Hope's complaint meets the subjective prong and sufficiently states an Eighth Amendment claim.

Hope's *pro se* complaint states an Eighth Amendment claim against all Respondents because prolonged solitary confinement violates the evolving standards of decency and is unconstitutional *per se*. Even if this Court declines to endorse a *per se* rule, Hope's particular conditions of confinement pose substantial physical and psychological dangers that threaten his health and safety. All Respondents were aware of the obvious dangers posed by Hope's conditions, and all acted with reckless indifference to those risks. Hope's *pro se* complaint sufficiently alleges an Eighth Amendment claim against all Respondents.

Applicant Details

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Applicant Education

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Date of JD/LLB	**May 17, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Human Rights Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Foundation Moot Court (for all 1Ls)**

Bar Admission

Prior Judicial Experience

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June 6, 2023

The Honorable Beth Robinson
United States Court of Appeals
Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am a recent graduate of Columbia Law School, where I was an editor of the *Human Rights Law Review*. This fall, I will commence a one-year fellowship in appellate public defense. I write to apply for a clerkship in your chambers beginning in 2024. As a public interest lawyer who hopes to return to New England, I would be grateful for the opportunity to clerk in your chambers.

I would be humbled to clerk with a judge who has spent a career in public service, as you have. As a Public Interest/Public Service Fellow, I have committed to spending my career in the public interest, and I spent much of my time at Columbia doing pro bono work. I worked with formerly incarcerated people through the Paralegal Pathways Initiative, which helps to leverage the legal skills that people have gained during their incarceration in order to secure employment in the legal profession. I was also an Articles Editor for *A Jailhouse Lawyer's Manual*, which is a self-help legal guide designed for people in prison.

My year in appellate defense will further strengthen my research and writing skills. This fellowship, combined with my significant work experience before law school, would facilitate my adjustment to chambers and allow me to make strong contributions as your law clerk.

Enclosed please find my resumé, transcripts, writing sample, and letters of recommendation from Professors Maeve Glass ((212) 854-0073, mglass2@law.columbia.edu), Jedediah Purdy ((919) 660-3952, purdy@law.duke.edu), and Sarah Seo ((212) 854-4779, as2607@columbia.edu).

I would welcome any opportunity to speak with you. Thank you for your consideration. Please note that email is the best way to contact me, as I am currently out of the country.

Respectfully,

Laura McFeely

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EDUCATION

COLUMBIA LAW SCHOOL, New York, NY
J.D., received May 2023
Honors: Ruth Bader Ginsburg Prize (for outstanding academic achievement in all three years)
James Kent Scholar (for outstanding academic achievement, 2020–23)
Best in Class Award, Criminal Law (Professor Sarah Seo)
Max Berger '71 Public Interest/Public Service Fellow
Academic Scholar (for students with ambition to pursue legal academia)
Activities: Teaching Fellow for Constitutional Law (Professor Maeve Glass)
Human Rights Law Review—A Jailhouse Lawyer's Manual, Articles Editor
Human Rights Law Review, Staff Editor
Student Fellow for Constitutional Democracy Initiative
Health is Justice (pro bono project analyzing COVID compassionate release decisions)
Human Rights Institute 1L Advocates Program
Note: *Defining the Public: Administrative Rulemaking Requirements in the Carceral Context* (published in the *Columbia Human Rights Law Review*, Fall 2022)

DARTMOUTH COLLEGE, Hanover, NH
B.A. in History, *cum laude*, received June 2013
Honors: Jones Prize for Best Thesis in American History
James O. Freedman Presidential Scholar
High Honors in History
Rufus Choate Scholar 2012–13 (top 5% of grade point average)
Activities: Presidential Scholar Research Assistant for Professor Russell Rickford
Thesis: *"These People Are Out of Control": Media Portrayal of Black Communities during the Crack Cocaine "Epidemic" of the 1980s*

EXPERIENCE

CENTER FOR APPELLATE LITIGATION, New York, NY
Kirkland & Ellis NYC Public Service Fellowship September 2023 – September 2024
Will represent roughly ten clients in appeals of their felony convictions, including researching and writing appellate briefs, developing and maintaining relationships with clients, and conducting oral arguments in front of the Appellate Division, First Department. Caseload will include direct appellate work and, as appropriate, post-conviction litigation in criminal trial court, advocacy on behalf of survivors of domestic violence, innocence investigations, immigration-related work, impact litigation, and federal habeas work.

Criminal Appeals Extern September 2022 – December 2022
Reviewed trial record, researched issues, and co-wrote a brief for a criminal appeal on behalf of a person convicted of a felony in the Appellate Division, First Department.

LEGAL AID SOCIETY, Bronx, NY
Legal Intern, Criminal Defense Practice June 2022 – August 2022
Interviewed clients at arraignments and made bail arguments in court. Interviewed incarcerated client and drafted letter to the Board of Parole. Wrote memos on reasonable suspicion, DWIs, and youth offender status.

PARALEGAL PATHWAYS INITIATIVE, New York, NY
Member, Participant Recruitment and Mentorship Team September 2021 – May 2022
Assisted with training program at Columbia Law School for formerly incarcerated people to leverage the legal talents they gained while incarcerated in order to secure jobs in the legal profession. Advertised, interviewed, and selected participants for the course. Recruited and matched mentors in the legal profession with participants.

BRONX DEFENDERS, Bronx, NY
Legal Extern, Family Defense Practice September 2021 – December 2021
Drafted motions, reviewed discovery, researched legal arguments, communicated with clients and attorneys in other practices (immigration, criminal, and civil), observed hearings, and appeared in a criminal case.

FEDERAL DEFENDERS, Montgomery, AL
Legal Intern June 2021 – August 2021
Assisted the Trial and Capital Habeas Units. Wrote discovery memos and motion to compel in a 42 U.S.C. § 1983 case on behalf of a person at the execution-eligible stage. Researched a jury issue for a potential petition for certiorari and drafted a petition for a Fourth Amendment issue. Visited clients in jail and on death row and wrote internal client visit memos. Attended a trial, sentencings, and supervised release revocation hearings.

COLUMBIA LAW SCHOOL, New York, NY
Research Assistant to Professor Elizabeth Emens May 2021 – August 2021
Researched legislative history on racially restrictive covenants in property deeds, wrote a memo on sex and gender in scientific studies, and cite-checked journal article on the Americans with Disabilities Act.

CASE METHOD PROJECT, Harvard Business School, Boston, MA
Research Associate March 2018 – January 2020
Supported 400 high school teachers in using the case method to teach about American democracy and increase critical thinking and civic engagement. Created and executed data management strategies in order to scale the project and triple the number of teachers. Managed recruitment partnership with League of Women Voters.

INTERISE, Boston, MA
Senior Associate, Research & Communications January 2017 – March 2018
Researched and wrote paper on income inequality, the racial wealth gap, and how strengthening minority-owned small businesses can create jobs and wealth locally. Managed organization's production of reports and projects, produced external communications, and wrote applications for awards and speaking engagements.

Program Associate, Small Business Administration (SBA) November 2014 – January 2017
Managed support for 54 program managers in SBA's Emerging Leaders initiative, delivering Interise's curriculum to 900 small business owners annually. Created tools for recruiting in low-income communities. Conducted site visits and trainings, created pilot program for alumni meetings, analyzed data, and wrote reports.

SANFORD HEISLER, LLP, New York, NY
Legal Assistant July 2013 – August 2014
Assisted attorneys at plaintiff-side law firm specializing in employment discrimination. Drafted complaints and correspondence, managed court deadlines, administered class settlement, and conducted client intake interviews.

Columbia
Law School

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CLS TRANSCRIPT (Unofficial)

05/26/2023 12:42:07

Program: Juris Doctor

Laura M McFeely

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6905-1	Antidiscrimination Law	Johnson, Olatunde C.A.	3.0	A
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	A
L6655-1	Human Rights Law Review		0.0	CR
L8296-1	S. Academic Scholars	Kraus, Jody	1.0	A
L6683-1	Supervised Research Paper	Seo, Sarah A.	1.0	CR

Total Registered Points: 9.0

Total Earned Points: 9.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Richman, Daniel	3.0	A
L6663-1	Ex. Criminal Appeals	Schatz, Ben A.; Zeno, Mark	2.0	A
L6663-2	Ex. Criminal Appeals - Fieldwork	Schatz, Ben A.; Zeno, Mark	2.0	CR
L6655-1	Human Rights Law Review		0.0	CR
L6359-1	Professional Responsibility in Criminal Law	Cross-Goldenberg, Peggy	3.0	A
L8296-1	S. Academic Scholars	Kraus, Jody	1.0	A
L8990-1	S. Current Issues in Civil Liberties and Civil Rights	Shapiro, Steven	2.0	B+
L6683-1	Supervised Research Paper	Seo, Sarah A.	2.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6109-1	Criminal Investigations	Livingston, Debra A.	3.0	A
L6655-1	Human Rights Law Review		0.0	CR
L6169-2	Legislation and Regulation	Judge, Kathryn	4.0	A-
L8296-1	S. Academic Scholars	Kraus, Jody	1.0	CR
L8819-1	S. Public Law Workshop [Minor Writing Credit - Earned]	Bulman-Pozen, Jessica; Johnson, Olatunde C.A.	2.0	A-
L6683-1	Supervised Research Paper	Purdy, Jedediah S.	2.0	A
L8517-1	Workshop on Facilitating Meaningful Reentry	Genty, Philip M.; Strauss, Ilene	2.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L8419-1	Abolition: A Social Justice Practicum	Harcourt, Bernard E.; Shukur, Omavi	2.0	A
L8419-2	Abolition: A Social Justice Practicum: Experiential Lab	Harcourt, Bernard E.; Shukur, Omavi	1.0	A
L6241-2	Evidence	Capra, Daniel	4.0	A
L6792-1	Ex. Bronx Defenders on Holistic Defense	Chokhani, Natasha; Cumberbatch, Shannon; Herrera, Gregory	2.0	A-
L6792-2	Ex. Bronx Defenders on Holistic Defense - Fieldwork	Chokhani, Natasha; Cumberbatch, Shannon; Herrera, Gregory	2.0	CR
L6655-1	Human Rights Law Review		0.0	CR
L6675-1	Major Writing Credit	Purdy, Jedediah S.	0.0	CR
L8296-1	S. Academic Scholars	Kraus, Jody	1.0	CR
L6695-1	Supervised JD Experiential Study	Genty, Philip M.	2.0	CR
L6683-1	Supervised Research Paper	Purdy, Jedediah S.	1.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6223-1	Comparative Constitutional Law	Khosla, Madhav	3.0	A
L6108-4	Criminal Law	Seo, Sarah A.	3.0	A
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6130-7	Legal Methods II: Building Legal Change: Moving Advocacy Outside of Court	Hechinger, Scott; Rodriguez, Alejo; Shanahan, Colleen F.	1.0	CR
L6121-8	Legal Practice Workshop II	Kosman, Joel	1.0	P
L6116-4	Property	Purdy, Jedediah S.	4.0	A
L6118-1	Torts	Merrill, Thomas W.	4.0	B+

Total Registered Points: 16.0

Total Earned Points: 16.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-3	Civil Procedure	Genty, Philip M.	4.0	A
L6133-5	Constitutional Law	Glass, Maeve	4.0	A
L6105-3	Contracts	Emens, Elizabeth F.	4.0	A
L6113-4	Legal Methods	Briffault, Richard	1.0	CR
L6115-8	Legal Practice Workshop I	Kosman, Joel; Whaley, Hunter	2.0	HP

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 84.0
Total Earned JD Program Points: 84.0

Best In Class Awards

Semester	Course ID	Course Name
Spring 2021	L6108-4	Criminal Law

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	Ginsburg Scholar	3L
2022-23	James Kent Scholar	3L
2021-22	James Kent Scholar	2L
2020-21	James Kent Scholar	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	32.0

May 27, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write this letter in enthusiastic support of Laura McFeely's application for a clerkship in your chambers. I have had the privilege to work closely with Laura over the past two years. During this time, I have come to know Laura both as an exceptional law student in my Constitutional Law course as well as an excellent teaching assistant for the course this past spring. Throughout our relationship, I have been impressed with Laura's superb analytical and writing skills, as well as her unrivalled work ethic, collegiality, and innate kindness and compassion for others. An aspiring public defender and law professor who has received highest honors here at Columbia Law School, Laura will make a phenomenal law clerk.

In my Constitutional Law course, Laura wrote one of the very best final exams in the class, easily earning one of the only three "A" grades allotted under Columbia Law School's rigorous first-year curve. As I later relayed to Laura, her legal analysis was simply a joy to read. In clear and succinct prose, Laura sifted through two complex fact patterns based on recent cases and identified subtle issues of law that other students had missed. In analyzing these issues, Laura brought to bear a dazzling array of precedents, noticing the ambiguities in the doctrine before offering a reasoned conclusion based on the facts of the case. This elegant and rigorous legal analysis was consistent with the excellent memos that Laura had written throughout the course, including a superb analysis of the modes of constitutional interpretation deployed by Justice Story in Prigg v. Pennsylvania, as well as a thoughtful analysis of a hypothetical fact pattern that asked students to assess plausible formulations of the holding of *Gibbons v. Ogden*.

Owing to this exemplary performance in class, I was delighted when Laura agreed to serve as a teaching assistant for the course this past spring semester. Over the semester, I was constantly impressed by the thoroughness, professionalism, and collegiality that Laura brought to her role as a law teacher. In the discussion materials that she created for the weekly TA sessions, Laura presented each case in relation to the doctrines that came before it, while noting how advocates might formulate the holdings at different levels of generality. Laura also regularly offered helpful comments and feedback on the discussion materials that her fellow teaching assistants created. With a meticulous eye for detail, Laura once noticed a doctrinal mistake on a slide prepared by a fellow teaching assistant that she tactfully corrected. At the end of the semester, I was fortunate to be able to sit in on a class that Laura co-taught. It was truly inspiring to see Laura at the podium before a room of over forty students. Speaking with poise and confidence, Laura fielded questions from students with ease, while deftly adding nuance to the student's discussion of NFIB v. Sebelius. "Just remember," she remarked, "Chief Justice Roberts is the only person writing." Throughout, it was clear that the students respected and admired Laura for her brilliance and kindness.

In addition to possessing these truly exemplary skills, Laura is a warm and easy-going person who is a delight to work with and learn from. As a Public Interest/Public Service Fellow, Laura has a strong sense of the areas of the law that she is interested in pursuing as a public defender, but remains passionate and curious about new areas of the law. During the first semester at law school, for example, Laura regularly attended my small-group office hours to discuss the nuances of constitutional law cases. Laura's questions bespoke both a willingness to better understand the core of common law reasoning, as well as a curiosity in understanding how history relates to legal analysis. To offer just one example of Laura's kindness: during one of the first classes of the semester this past spring, I was having difficulty catching my breath as I endeavored to lecture through a mask. As I wondered whether I would be able to continue teaching before an audience of 120 students, Laura suddenly appeared at the podium with a bottle of water and a smile of encouragement.

In short: it has been one of the great joys of my time on the faculty to work with Laura. I have no doubt that she will be an excellent addition to your chambers. If I can be of any further assistance in your review of her application, please feel free to contact me.

Sincerely,

Maeve Glass

Maeve Glass - maeve.glass@law.columbia.edu - _212_ 854-0073

May 27, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:
I write to enthusiastically recommend Laura for a clerkship in your chambers. I know Laura from having her in Criminal Law in the Spring 2021 semester, where she earned the honor of Best in Class. She is now my mentee as part of Columbia Law School's Academic Scholars Pro-gram. Through these connections, I've now had several conversations with Laura and learned of her experiences that led her to law school, as well as her unwavering commitment to pursuing jus-tice through advocacy, practice, and scholarship. She is hoping to clerk for you as part of that pur-suit.

Laura spent her post-1L summer interning with the Federal Defenders in Alabama. We had a conversation in the middle of that summer about the (three!) research questions that came out of her experiences. One of the topics in particular came from an especially astute observation: Laura was struck by the fact that all the corrections officers she met in Alabama were Black and that many criminal defendants represented by the Federal Defenders had previously worked in the mili-tary or as corrections officers themselves. Laura was interested in exploring how limited economic opportunities for Black people in Alabama – and the United States – have shaped, and have been shaped by, the prison industrial complex. If Laura one day decides to pursue these questions fur-ther, her research has the potential to complicate narratives that assume that state actors are white, ignoring the complexities of race and class. This can be groundbreaking work in the vein of James Forman's Pulitzer Prize-winning book Locking Up Our Own, which examined why Black leaders in the 1970s promoted tough-on-crime policies.

This is obviously a huge research topic, and so Laura wisely decided to tackle a more man-ageable, but equally important, topic for her Note. Laura has been examining the tension of prisons as a site of heightened state power that lacks democratic governance. This is a brilliant framing that illuminates the contradictions in our carceral policies, and Laura's paper challenges us to think about how the methods of punishment should reflect democratic norms and, in the process, urges a renewed vision of democracy. The insights of this paper exceed those of many law review articles written by seasoned academics.

From her pre-law school experiences to her law-school activities, Laura has demonstrated a commitment to fight for those most vulnerable in the criminal legal system through both practice and academic study. I'm excited about what Laura will accomplish in her career, and I consider myself lucky to have crossed paths with her. It's my pleasure now to recommend Laura to you. Please do not hesitate to reach out to me with any questions. I would be happy to be of further assistance.

Sincerely,

Sarah A. Seo

Sarah Seo - as2607@columbia.edu

May 27, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

The first thing to know about Laura McFeely is that she has been an essentially perfect law student, earning an "A" grade in every classroom course but one. The second thing to know is that she is much more than her sterling academic record. She is deeply intellectually engaged and strongly committed to public service. She is already one of our very top students, a true standout, and I am confident that she will remain both superlative and superlatively interesting. I urge you to hire her, and am sure you'll be glad if you do.

I met Laura as a 1L student in Property. This was in the spring semester of an all-remote year, and everyone was tired and, in many cases, understandably grumpy. I came to know Laura, inside her Zoom box, as a student who was always visible and visibly engaged. Classroom exchanges showed her to be low-key with a humble vibe—not one of those students who put themselves forward insistently—but always in command of the material, and usually looking to take our discussion somewhere interesting and constructive. I wasn't surprised when her exam was one of the best in the class.

Laura asked me to supervise her student note, which I was very glad to do. She used to note to explore a ubiquitous set of doctrines and statutes—there appears to be a version in every state—that exclude jail and prison regulations from the procedures of public review, and feedback that are meant to anchor administrative regulation in public accountability. These procedures are widely seen as essential to the legitimacy of regulations ranging from environmental standards to health and safety rules to financial oversight: when the administrative state prepares to commands people, it must give a public accounting of the regulations that it will apply, and respond to criticisms and other feedback. How do carceral regula-tions avoid this requirement?

The answer, it turns out, is that incarcerated people are classified by legal doctrine in many states as being "not part of the public." The meaning of this striking classification is what Laura is exploring in her present note. What does this formula, which Laura has tracked across jurisdictions, reveal about the law and about membership in the United States polity? And, whatever we make of that large question, is the concept of "the public" being used here in a doctrinally consistent and appropriate way?

These are the kinds of analytically precise and intellectually creative engagements with the law that promise to make Laura both an effective lawyer and, ultimately, a pathbreaking scholar who can shine light on what has been obscure. In putting together the note, Laura did a tremendous amount of self-structured doctrinal research. Only when that was done did she draw it into her own arguments. Her respect for the legal material is particularly admirable in someone whose convictions about justice are very strong.

Laura has done all of this outstanding academic work while also externing with the famously ex-cellent and intense Bronx Defenders and engaging in a variety of other service work, including leadership in our admirable student initiative to assist formerly incarcerated people in becoming paralegals. She has also been a teaching assistant for my colleague Maeve Glass—a high honor and a demanding role, entail-ing great responsibility for our students' training. I suppose that Laura developed the maturity to balance this range of commitments during her seven years of workplace experience after Dartmouth College (where she also shone): this is a person who knows how to manage her time, set priorities, and help an operation to run smoothly. It isn't every day that one encounters these capacities in a very top law student.

I'd be remiss if I didn't mention that Laura is a nice person. I always enjoy our conversations, and am consistently struck by Laura's way of combining humility with the highest level of achievement.

I am delighted to give Laura my strongest recommendation, without reservation. I hope you'll be able to hire her, and I know you will be glad if you do.

Sincerely,

Jedediah Purdy
William S. Beinecke Professor of Law

Jedediah Purdy - jpurdy@law.columbia.edu - (212) 854-0593

LAURA M. McFEELY
Columbia Law School J.D. ’23
(914) 874-7368
LM3595@columbia.edu

CLERKSHIP APPLICATION WRITING SAMPLE

This writing sample is a draft of a petition for a writ of certiorari from the U.S. Supreme Court on a Fourth Amendment search issue. I wrote it for the Federal Defenders for the Middle District of Alabama and provided it as a first draft to the attorneys. I was given this assignment as I was ending my summer internship and it demonstrates my ability to conduct research and write under time constraints. My supervisor, Mackenzie Lund, has given me permission to use this condensed and redacted version. This draft has not been edited by any other people. The bracketed portion indicates where I have summarized relevant facts.

Petition for Writ of Certiorari from the Supreme Court

QUESTION PRESENTED

In this case, law enforcement installed and monitored a sophisticated global positioning system ("GPS") tracking device on a confidential informant's vehicle to track a suspect by electronic, rather than visual, surveillance. The police did not seek a warrant. This Court held in *United States v. Knotts*, 460 U.S. 276, 285 (1983), that rudimentary beeper signals that augmented police's visual surveillance did not invade any legitimate expectation of privacy and therefore did not constitute a search under the Fourth Amendment. In *United States v. Jones*, 565 U.S. 400, 409 (2012), this Court held that installing and using a GPS tracking device on a car is a common-law trespass against the owner and therefore a search under the Fourth Amendment.

The question presented is that left unanswered by *Knotts* and *Jones*: is non-trespassory GPS tracking that is more invasive than a rudimentary beeper a search under the Fourth Amendment?

STATEMENT OF THE CASE

The case presents the question of whether the Fourth Amendment protects against warrantless non-trespassory global positioning system ("GPS") tracking that is quantifiably more invasive than a beeper and largely replaces, rather than augments, visual surveillance.

On February 2, 2019, Corporal Snow received a tip from a confidential informant ("CI-1") that Mr. John Smith planned to drive to Gilboa to buy methamphetamine. No record exists of this tip, nor were there any additional details about the seller or the address of the predicted pickup.

Corporal Snow's colleague at the City of Bethel Police Department, Officer Fisher, contacted a different confidential informant ("CI-2"). CI-2 had agreed to work with the police department only the day before, on February 1, when Officer Fisher found over 100 grams of

methamphetamine on her at a traffic stop. CI-2 said that she was familiar with Mr. Smith and would reach out to get more information. CI-2 called Officer Fisher back shortly thereafter and said that Mr. Smith had confirmed his plans, that he planned to buy 1.5 ounces in Gilboa that night, and that he asked to borrow her truck. No records or confirmation exist of this phone call, nor was it conducted in front of any officers.

CI-2 consented to Officer Fisher placing a GPS tracking device on her truck, which he attached magnetically behind the rear wheel on the driver's side. The GPS tracker was programmed to "sleep" when not in motion and to send a notification to the officer when it sensed motion again. The signal could be received by website or by smartphone application ("app"); Officer Fisher opted to monitor it using the app on his smartphone. The GPS tracker allowed him to see the vehicle's street address, rate of speed, longitude, latitude, altitude, and total distance travelled. He programmed the device to send this information every five seconds when it was in motion.

One or two hours later, around 3:30 or 4:30 pm on February 2, 2019, CI-2 told Officer Fisher that the truck was in Mr. Smith's possession, and Officer Fisher began monitoring its location in real time. He watched on his smartphone app as the truck reentered Bethel and stopped at an address on River Road. He and Corporal Snow drove to the address and confirmed that the truck was stopped there, although they did not see Mr. Smith or any other occupant of the truck.

[Officer Fisher followed the GPS tracker as the truck traveled to and from Gilboa the next day. Officer Fisher pulled over the truck upon its return. Mr. Smith was driving the car. Officer Fisher searched the car and found methamphetamine and two firearms. Mr. Smith was indicted on three counts: possession with intent to distribute a detectable amount of methamphetamine, in violation of 21 U.S.C. § 841(a)(1); using a firearm during and in relation to a drug trafficking

crime, in violation of 18 U.S.C. § 924(c)(1)(A); and possession of firearms by a convicted felon, in violation of 18 U.S.C. § 922(g)(1).]

Mr. Smith filed a motion to suppress evidence, in which he also moved for an evidentiary hearing and argued that, as a bailee, his Fourth Amendment rights were violated while he had possession of the truck. The police report implied that the police had followed Mr. Smith the entire time. [Quotations omitted.] The evidentiary hearing revealed that the police report had been misleading and that there was no visual surveillance until the very end of the tracking period.

The Magistrate Judge recommended that the motion to suppress be denied, although he noted key differences from existing Supreme Court precedent. First, the GPS tracking did not "augment" visual surveillance but almost entirely replaced it. *United States v. Smith*, No. 19-CR-0001, 2019 WL 9999999, at *5 (M.D. Ala. Aug. 1, 2019), *report and recommendation adopted as modified*, 100 F. Supp. 3d 1 (M.D. Ala. 2019), *aff'd*, No. 20-10000, 2021 WL 3333333 (11th Cir. June 1, 2021). Therefore, "it could be argued that law enforcement went beyond the 'mere visual surveillance' sanctioned by *Knotts*, *Karo*, and *Jones* to achieving the same results electronically, the constitutionality of which was expressly left unanswered in *Jones*." *Id.*

Second, he found the GPS tracking to be more similar to the cell-site location information ("CSLI") in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), than the "rudimentary beeper information addressed in *Karo* or *Knotts*." *Id.* He also noted that the *Carpenter* opinion had "recognized that five Justices in *Jones* agreed that privacy concerns would be raised by GPS cell phone tracking or 'surreptitiously activating a stolen vehicle detection system,'" i.e., non-trespassory GPS tracking. *Id.* (citing *Carpenter*, 138 S. Ct. at 2215).

The Magistrate Judge ultimately concluded that, while the GPS tracking was more invasive, the duration (less than 24 hours) distinguished this from *Jones* and *Carpenter*. *Id.* at *6.

Mr. Smith objected to the recommendation on the grounds that a standard based on time duration was arbitrary. Doc. 50 at 6.

The District Court lamented that "district courts still possess scant and contradictory guidance as to whether *non-trespassory* GPS vehicle monitoring, as in this case of a borrowed truck, is an unreasonable search under the Fourth Amendment." *United States v. Smith*, 100 F. Supp. 3d 1, 2 (M.D. Ala. 2019), *aff'd*, No. 20-10000, 2021 WL 3333333 (11th Cir. June 1, 2021). The judge noted that "[t]he idea that constitutionality could hinge on the duration of a 'search' has puzzled a Supreme Court justice, several circuit judges, three district courts, two state supreme courts, and one of the nation's leading Fourth Amendment scholars," *id.* at 3–4 (footnotes omitted), but ultimately concluded that the facts were most analogous to *Knotts*, in part because of the 22-hour time period. *Id.* at 5. The District Court applied *Knotts* as precedent without conducting a *Katz* analysis.

After his motion to suppress evidence obtained from a warrantless search was denied, Mr. Smith entered into a conditional guilty plea and reserved his right to appeal the district court's ruling on his motion to suppress. Doc. 60 at 7. The district court accepted Mr. Smith's guilty plea, Doc. 70 at 15, and sentenced him to 140 months total. Doc. 80 at 40.

Mr. Smith timely appealed. Docs. 85, 86. The Eleventh Circuit affirmed the denial of the motion to suppress *per curiam*, finding that no reversible error had been shown. *United States v. Smith*, No. 20-10000, 2021 WL 3333333, at *3 (11th Cir. June 1, 2021). The appellate court agreed that the facts fell within *Knotts* and that the GPS tracking augmented the officers' sensory facilities because the officers could have gathered the information through visual surveillance. *Id.*

The petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. This is a federal question, unresolved by *Jones*, for which lower courts lack guidance.

The main question in this case—whether the Fourth Amendment protects against warrantless non-trespassory GPS tracking—requires resolution in order to guide lower courts. Only this Court can resolve whether *Katz v. United States*, 389 U.S. 347 (1967) and *United States v. Jones*, 565 U.S. 400 (2012), provide any protection against invasive real-time GPS tracking when a trespass has not occurred. Only this Court can provide guidance as to how *Jones*, *Katz*, and *United States v. Knotts*, 460 U.S. 276 (1983), fit together.[1]

The *Katz* Court provided a two-part test for determining the extent of Fourth Amendment protection against warrantless searches: if the person had a subjective expectation of privacy, and society was prepared to accept it as reasonable, then a violation of that privacy was a search and required a warrant. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). In *Jones*, this Court explained that the *Katz* test supplemented, but did not replace, the idea of physical trespass at the core of the Fourth Amendment. *Jones*, 565 U.S. at 409. The *Jones* Court held that the installation and monitoring of a GPS tracker on an individual's car was a search due to physical trespass without conducting a *Katz* analysis.

The facts in *Jones* left unresolved the question of how the *Katz* analysis would have turned out had issues of trespass-to-chattel not been at play. However, the *Jones* Court emphasized that

[1] The District Court described the issue in this case as "a Fourth Amendment quandary." *United States v. Smith*, 100 F. Supp. 3d 1, 9 (M.D. Ala. 2019), *aff'd*, No. 20-10000, 2021 WL 3333333 (11th Cir. June 1, 2021). *See also id.* at 11 ("[B]eginning with *Jones* in 2012 and continuing through *Carpenter* in 2018, the property notion of trespass has been quickened. It is getting harder and harder to tell the quick from the dead."); *id.* at 11 ("This Court is not the only one left in the lurch by the present state of the law."); *id.* at 11 ("Lest one thinks this lack of guidance is by accident, the Supreme Court noted last year in *Carpenter* that 'no single rubric definitively resolves which expectations of privacy are entitled to protection.'"); *id.* at 11 (noting that *Carpenter* did not offer much guidance, and "[a]nswers evade analysis. Consequently, one is 'left with two amorphous balancing tests, a series of weighty and incommensurable principles to consider in them, and a few illustrative examples that seem little more than the product of judicial intuition.'"); *id.* at 13 (Following *Carpenter*, "[c]ourts like this one are left to decide just how long is a piece of string.").

trespass was not the "exclusive test" and that "[s]ituations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis." *Jones,* 565 U.S. at 411.

The facts here—that the placement occurred while the truck was in the owner's possession, but the use of the GPS tracker occurred in petitioner's possession—pinpoint the difficulty of applying the holding of *Jones.* Justice Alito noted in his concurrence that, by holding that the installation and monitoring of the GPS tracker together constituted a search, "the Court's reasoning largely disregards what is really important (the *use* of a GPS for the purpose of long-term tracking)." *Jones,* 565 U.S. at 424 (Alito, J., concurring).[2]

The District Court found that no physical trespass had occurred and *Jones* thus did not govern this case. The District Court found the facts most analogous to *Knotts*, where this Court conducted a *Katz* analysis to conclude that law enforcement's warrantless use of a rudimentary beeper that transmitted a signal over a short range on public roads did not violate the respondent's reasonable expectation of privacy. *Knotts*, 460 U.S. at 281. The District Court found that, because the facts were most analogous to *Knotts*, "a full-scale *Katz* evaluation of these facts is not warranted." *Smith*, 100 F. Supp. 3d at 6.

The District Court reluctantly applied *Knotts*: "'It may be that achieving the same result [as extended visual observation] through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy,' *Jones*, 565 U.S. at 412, but neither the Supreme Court nor the Eleventh Circuit has yet held as much." *Smith,* 100 F. Supp. 3d at 6. The District Court

[2] *See also United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring) (Justice Brennan questioned the idea that installing a beeper with the owner's consent before selling it to an "unsuspecting buyer" satisfied the Fourth Amendment and stated that he was "not at all sure that . . . there is a constitutionally significant difference between planting a beeper in an object in the possession of a criminal suspect and purposefully arranging that he be sold an object that, unknown to him, already has a beeper installed inside it.") (citation omitted).

was powerless to "extend new protections to new technologies" without precedent from a higher court. *Smith*, 100 F. Supp. 3d at 7.

The lower courts' rulings in this case hold troubling implications for future law enforcement activity. This warrantless tracking only comes to light where it has been successful and law enforcement wants to use the evidence it has gathered. The holdings imply that such GPS tracking would still not constitute a search had the police been wrong, either because no illegal activity ended up occurring or because the driver did not match the person they expected to see. If Smith had not been the person driving the car and the police had not pulled the truck over at the end of the 200-mile journey, no one besides the police and CI-2 would have ever known about the extensive information gathered about that person's travels.

The Court has suggested a distinction between short-term and long-term tracking, based on the intrusion into privacy that the latter entails.[3] But a temporal distinction cannot justify tracking that is so invasive as to qualify as a search.

II. Unlike in *Knotts*, the police abandoned any attempt at visual surveillance, and the device here therefore cannot be said to have "augmented" their natural sensory abilities.

The Supreme Court should issue a writ to resolve a question that lower courts face in applying *Knotts*. The *Knotts* Court reasoned that the rudimentary beeper augmented police officers' sensory capabilities, even though the police lost sight of the car for about an hour. But where, as here, the electronic surveillance replaced visual surveillance, can it be said that such technology is augmenting the police officers' sensory ability to conduct visual surveillance?

[3] "As with GPS information, the time-stamped [CSLI] data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (citing *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)).

In *Knotts*, law enforcement used a rudimentary beeper and had to stay within a short range to receive the signal. *Jones*, 565 U.S. at 429 n.10 (Alito, J., concurring).[4] When the following car lost the signal, the police had to deploy a helicopter to pick it up again. *Knotts*, 460 U.S. at 278.

The District Court in this case did its best to compare the facts to the original meaning of the Fourth Amendment.[5] But the analogy fails. Just like in *Jones*, it is "almost impossible" to think of Founding-era analogies to this type of surveillance. *Jones*, 565 U.S. at 420 (Alito, J., concurring). The GPS tracking device here allows police to gather information that is so detailed, precise, and accurate that there is no accurate analogy to Founding-era law enforcement.[6]

The District Court's characterization of the facts as most analogous to *Knotts* was at odds with that of the Magistrate Judge who presided over the evidentiary hearing. The Magistrate Judge found that the GPS tracking here, which did not necessitate any accompanying visual surveillance, was more similar to the CSLI data in *Carpenter* than the rudimentary beeper in *Knotts*, which could transmit a signal only within a short range and required accompanying visual surveillance.

The Eleventh Circuit found that the tracking device here "'augmented [the officers'] sensory faculties,'" just like the beeper in *Knotts*. *Smith*, 2021 WL 3333333 at *3. But one cannot augment something that does not exist. The police were not using their sensory faculties except to look at an app on their phones. Unlike *Knotts*, there was no attempt to simultaneously follow the vehicle via visual surveillance. The officer watched an application on his smartphone, went to bed, and resumed looking at the car's progress on his phone in the morning.

[4] In *United States v. Karo*, 468 U.S. 705 (1984), this Court clarified that the installation of a beeper did not infringe any Fourth Amendment interests. 468 U.S. at 713.
[5] "If a constable in 1789 received consent to exchange the wheels on a stagecoach with ones that leave a distinctive marking on the road before the coach was to be borrowed by a smuggler, he or she could wait hours before following the tracks to his target." *Smith*, 100 F. Supp. 3d at 1.
[6] For example, the trip in this case did not occur on the expected day, but the police did not have to adjust their surveillance.

The *Knotts* Court held that "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Knotts*, 460 U.S. at 281. Anyone who "wanted to look" could see where a driver travelled, stopped, and exited the vehicle. *Id.* But the electronic surveillance here is different in kind, not in degree. Law enforcement did not try to follow the car or to conduct visual surveillance. There is no chance for a car to even notice he or she is being followed. Even the most expert police officer might be spotted while doing visual surveillance. That would *never* happen while doing electronic surveillance via GPS tracking.

In addition, the recent opinion in *Carpenter* pointed out that the holding in *Knotts*, that there is *no* reasonable expectation of privacy on public roads, may not be a bright-line rule. The *Carpenter* Court noted that in *Jones*, "five Justices agreed that longer term GPS monitoring of even a vehicle traveling on public streets constitutes a search . . . . It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years." *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018).

It is possible that, "[i]n circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative." *Jones*, 565 U.S. at 429 (Alito, J., concurring). But in the absence of legislative action, the Court should apply Fourth Amendment doctrine and give the lower courts guidance.

Police officers should have to get a warrant so that there is some external knowledge or monitoring of law enforcement's use of GPS tracking devices. Law enforcement should not be allowed to self-regulate, without any check from another branch, "a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power."

Jones, 565 U.S. at 416 (Sotomayor, J., concurring). Restraint must be imposed by the judicial branch, not by the agents themselves.[7]

CONCLUSION

For the above reasons, this Court should grant this petition for writ of *certiorari*.

[7] "In the absence of [judicial] safeguards [imposed by a warrant], this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." *Katz*, 389 U.S. at 356–57.

Applicant Details

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Applicant Education

BA/BS From	**Dartmouth College**
Date of BA/BS	**June 2020**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Chicago Journal of International Law**
Moot Court Experience	**No**

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June 12, 2023

The Honorable Beth Robinson
U.S. Court of Appeals for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am a rising third-year law and business student at the University of Chicago Law School and the Booth School of Business, and I am applying for a clerkship in your chambers for the 2024 term. I wholeheartedly believe I would have the most engaging, challenging, and rewarding clerkship experience in your chambers. As a graduate of Dartmouth College, a UChicago Law student, and a two-time summer associate at Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"), I am astounded by our identical educational and early career journeys. Further, after speaking to Liam Brown about his experience working with you, I am even more sure that this experience would provide me with the personal and professional relationships and growth I hope to obtain.

As a practicing attorney, I hope to work with either a Supreme Court & Appellate ("SCA") practice group or a White-Collar Crime ("WCC") practice group. Choosing to do white-collar work would allow me to work in an international or U.S. office long term, whereas SCA practice opportunities only exist in the United States. Since I am still unsure of which practice I will choose, I am interested in either or both district court and appellate court clerkships because an appellate clerkship provides an edge in SCA practices whereas district court experience is more relevant for WCC work. Further, I have longer-term dreams of becoming a federal judge one day. Clerking in your chambers would not only greatly improve my research and writing skills and provide perspective on the other side of litigation, but also would provide insight into whether I would like to pursue a judgeship in the future. For me, making the choice to pursue a judgeship is imperative because it will help me choose not only the practice area in which I will work, but also the continent in which I will live.

I would welcome the opportunity to apply my strong research, writing, and analytical skills as well as my practical experience in litigation to chambers. As a member of the *Chicago Journal of International Law*, I analyzed different international laws to determine which, if any, would provide recourse for disparate treatment between forced migrants in Europe for my Comment. At Skadden, I researched the intersection between federal preemption and state labor laws for transportation services that span multiple states in the U.S. and drafted a case summary to be distributed to the client. In addition, I conducted research and wrote a brief regarding the continuously changing standards of Article III standing during my first-year legal research and writing course. My final brief in *U.S. Supreme Court: Theory and Practice* argued against granting certiorari for a telecommunications case regarding vicarious liability and common law agency. Prior to law school, I gained extensive experience researching on Westlaw and Pacer for information later included in briefs, memoranda, and other materials while working as a paralegal at Shipman & Goodwin LLP.

A resume, transcript, and writing sample are enclosed. Letters of recommendation from Professors Peterson, Konsky, and Hubbard will arrive under separate cover. Should you require any additional information, please do not hesitate to reach out. Thank you for your time and consideration.

Warmly,

Natalia McLaren

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EDUCATION

The University of Chicago Law School and The Booth School of Business, Chicago, Illinois **June 2024**
Juris Doctor and Master of Business Administration expected
Journal: *Chicago Journal of International Law* (Comments Editor)
Activities: Supreme Court & Appellate Society (President, Co-Founder), Student Government (Student Voices Chair), Dean of Students Advisory Council, Fashion & Beauty Law Society (President), Booth Volleyball (Co-Chair), Black Law Students Association, International Law Society, Law School Musical

Dartmouth College, Hanover, New Hampshire **June 2020**
Bachelor of Arts, magna cum laude, Double Major: Government & English, Creative Writing and Psychology
Honors and Awards: Phi Beta Kappa, High Honors in English, W.E.B. Du Bois Award for Academic Excellence, Senior Law Prize, Jack Baird Prize, Presidential Scholar, Emerging Leader, Excellence in Management and Leadership
Activities: Mock Trial Society, Law Journal (Senior Editor), Women's Club Volleyball (Coach, Captain), Gospel Choir (Soloist), Committee on Standards (Judge), Department of Psychology (Research Assistant, Tutor)
Spanish Language Study Program: University of Barcelona, Barcelona, Spain **March 2018**
Government Foreign Study Program: London School of Economics and Political Science, London, England **September 2017**

EXPERIENCE

Skadden, Arps, Slate, Meagher & Flom LLP, Washington, District of Columbia; London, England **May 2022-August 2023**
1L and 2L Summer Associate, 1L Scholar **(Seasonal)**

- Conducted research regarding federal preemption and state labor laws for the Supreme Court and Appellate Practice
- Drafted an Interview Memo from a witness interview regarding compliance with anti-corruption and anti-bribery laws
- Researched manufacturer direct motor vehicle sales to consumers for an in-house client rotation at Capital One

Shipman and Goodwin, LLP, Washington, District of Columbia **August 2020-July 2021**
Insurance Litigation Paralegal

- Cite-checked and assisted attorneys in filing state, federal, and appellate pleadings
- Drafted and revised documents including motions, declarations, affidavits, and correspondence
- Conducted legal research and factual investigation through Westlaw and Pacer

United States Embassy in London, London, England **July 2019-September 2019**
Political Intern

- Assisted in the coverage of bilateral and multilateral political and security issues such as global terrorism, the proliferation of Weapons of Mass Destruction, and the U.S./UK role in Middle East crises
- Researched specific UK domestic and international political issues
- Created briefing memos and talking points for the Ambassador's trip to a strategically important British Overseas Territory

United States Senate, Washington, District of Columbia **January 2019-March 2019**
A. Leon Higginbotham Jr. Intern for Senator Robert P. Casey

- Drafted a Decision Memo for a bill regarding Veterans' Affairs
- Created Military Information Memos regarding the U.S. Strategic Command, Northern Command, and Central Command

Pennsylvania Department of Education, Harrisburg, Pennsylvania **July 2017-August 2017**
Intern

- Created a summary and analysis of policy revisions suggested by the United States Department of Education
- Analyzed and summarized policy recommendations regarding mental health impacts on university students in Pennsylvania

Pennsylvania's State Representative 189th District Office, East Stroudsburg, Pennsylvania **June 2017-August 2017**
Intern for State Representative Rosemary Brown

- Participated in constituent outreach methods through phone calls and letters
- Assisted employees in problem-solving issues with constituents

Powlette and Field, LLC: Attorneys at Law, Stroudsburg, Pennsylvania **June 2016-August 2017**
Legal Intern **(Seasonal)**

- Prepared and edited deeds, wills, power of attorneys, real estate closing documents, and other legal documentation
- Served as an intermediary between clients, real estate agents, the title agency, and lenders in over 30 real estate transactions

SKILLS

Legal: Bluebook citation format, Westlaw, Pacer, CM/ECF, DISCO databases, Concordance databases
Languages: Intermediate Spanish